

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

RICHARD R. ROOPER, CLERK

**STATE OF TENNESSEE, *ex rel.*
ROBERT E. COOPER, ATTORNEY
GENERAL,**

Plaintiff,

V.

CONSUMER DEPOT, LLC, et al.,

Defendants.

No. 06C1093

D.C.

**MEMORANDUM OF FACTS IN SUPPORT OF PLAINTIFF
STATE OF TENNESSEE'S MOTION FOR SUMMARY JUDGMENT**

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I. THE PARTIES

A. State of Tennessee

1. The plaintiff is the State of Tennessee, *ex rel.* Robert E. Cooper, Jr., Attorney General, and has the authority to enforce the Tennessee Consumer Protection Act of 1977, Tenn Code Ann. § 47-18-101, *et seq.*, through a civil law enforcement proceeding. *See* Order Granting Partial Summary Judgment to Plaintiff, State of Tennessee on the Issue of the Inapplicability of Defendants' Affirmative Defenses, p. 2, ¶ 1, December 16, 2008 (hereinafter "Dec. 16, 2008 Order"), Appendix pp. 824 - 862.¹

B. Consumer Depot

2. Defendant Consumer Depot, LLC ("Consumer Depot") is a Tennessee limited liability company with its principal place of business at 3332 Powell Avenue, Nashville, Tennessee. Dec. 16, 2008 Order, ¶ 2, **A825**.

3. Consumer Depot sells various electronic and computer goods to the general public from a retail facility located at 3332 Powell Avenue, through Consumer Depot's website and through third-party internet auction websites such as eBay. *Id.*

4. Consumer Depot obtains its inventory through bulk purchases of overstocked inventory, customer returns, open box returns, liquidated, damaged, defective and broken items from retailers such as Staples and Best Buy. *Id.*

5. Consumer Depot sorts these items, evaluates them and then offers them for sale to the public through its retail store or through the internet. Dec. 16, 2008 Order. *Id.*

6. Consumer Depot has operated under a number of different eBay user ids and names including **bargaindepot04**, **ubid-it**, **youbid2003**, **returndealz**, **techgraveyard**, **surplusdealz05**, **swdiscounters**, **factorydealz**, **mr-appliance**, **music-n-dvds** and **ubid-tn-01**. *Id.* ¶ 9.

7. Consumer Depot has also referred to itself as Bargain Depot, Factory Dealz, Return Dealz and Surplus Dealz. *Id.*

¹ All exhibits in support of this motion are contained in a concurrently filed two volume Appendix in Support of Motion for Summary Judgment and shall be cited as "A__."

C. Auction Logistix

8. Defendant Auction Logistix, LLC (“Auction Logistix”) is a Tennessee limited liability company with a principal place of business at 3332 Powell Avenue, Nashville, Tennessee. *Id.* ¶ 6.

9. At all times relevant hereto, Auction Logistix has actively participated in all of the Defendants’ sales and advertising, including the sale and advertising of Defendants’ products and has facilitated consumers’ payments for such products. *Id.*

10. Auction Logistix has also served as Defendants’ agent and has processed all of Defendants’ eBay or internet customer payments. *Id.*

11. Auction Logistix is owned and operated by defendant Martin Fike. *See* Responses Nos. 20 and 21 to Plaintiff’s Requests for Admissions Directed to Defendants, **A818**.

12. Defendant Martin Fike controls or has the authority to control the acts and practices of Auction Logistix. *Id.*

D. Martin Fike

13. Defendant Martin Randolph Fike (“Fike”) is a Tennessee resident and a shareholder, officer, employee and manager of defendant Consumer Depot. *See* Dec. 16, 2008 Order, ¶ 3, **A825**.

14. Defendant Fike created Consumer Depot on March 30, 1995. *Id.* ¶ 7.

15. At all times relevant hereto, defendant Fike has controlled and managed Consumer Depot in its day-to-day activities. *Id.* ¶ 3.

16. At all times relevant hereto, defendant Fike has been actively involved in Consumer Depot’s day-to-day activities. *Id.* ¶ 7.

17. Defendant Fike has served as the managing member of Consumer Depot since its inception. *Id.*

18. Defendant Fike created Auction Logistix on June 2, 2004. *Id.*

19. At all times relevant hereto, defendant Fike has controlled and managed Auction Logistix in its day-to-day activities. *Id.*

20. Defendant Fike has served as the managing member of Auction Logistix since its inception. *Id.*

21. At all times relevant hereto, defendant Fike has been actively involved in Auction Logistix' day-to-day activities. *Id.*

E. Carol Fike

22. Defendant Carol Fike ("Carol Fike") is a Tennessee resident and a shareholder, officer, employee and manager of defendant Consumer Depot. *Id.* ¶ 3.

23. Defendant Carol Fike also helps control and manage Consumer Depot in its day-to-day activities. *Id.* ¶ 4.

24. Carol Fike has also participated in formulating policy for Consumer Depot and supervises certain Consumer Depot employees and departments. *Id.*

25. In addition to her husband Martin Fike, Carol Fike is the only other owner of Consumer Depot. *Id.*

F. Michael Hinds

26. Defendant Michael Hinds ("Hinds") is a Tennessee resident and an employee and agent of Consumer Depot. *Id.* ¶ 5.

27. At all times relevant hereto, defendant Hinds ("Hinds") has personally and actively participated in many of Consumer Depot's day-to-day activities. *Id.* ¶ 5.

28. Defendant Hinds has some authority as an agent or employee to act on behalf of Consumer Depot and has also participated in formulating policy for Consumer Depot. *Id.*

29. Defendant Hinds and Fike writes the auction descriptions for the merchandise sold by Consumer Depot on eBay. *See* Deposition of Martin Fike, June 6, 2006 at p. 204, **A752**.

30. Defendant Hinds also supervises certain Consumer Depot employees and departments. *Id.*

II. DEFENDANTS' UNFAIR AND DECEPTIVE BUSINESS PRACTICES

A. The First Wave of Complaints Against Consumer Depot at the Tennessee Division of Consumer Affairs

31. The Tennessee Division of Consumer Affairs ("DCA") is a government agency charged with receiving complaints from the public regarding unfair or deceptive business practices. *See* Hughey (DCA) Aff., ¶¶ 1 - 3, **A34 - A35**. *See also* Tenn. Code Ann. § 47-18-5002(5) ("The division of consumer affairs ... shall ... (5) Serve as the central coordinating agency

and clearinghouse for receiving complaints by Tennessee consumers of illegal, fraudulent, deceptive or dangerous practices;”)

32. Beginning in January 2003, the DCA began receiving regular complaints about defendant Consumer Depot. *See* Hughey (DCA) Aff. ¶ 4, **A35**.

33. Consumers were primarily complaining that they were not getting the products they had ordered from Consumer Depot. *Id.* ¶ 5.

34. Consumers were also complaining that they were receiving broken, defective or damaged merchandise from Consumer Depot. *Id.*

35. Other consumers complained that the merchandise they received from Consumer Depot was not the merchandise that appeared in Consumer Depot’s photos of the merchandise. *Id.*

36. Some consumers complained that they received no merchandise at all from Consumer Depot - only empty boxes. *Id.*

37. Complaining consumers were frequently left with worthless or useless product. *Id.* ¶7.

38. When the DCA attempted to contact Consumer Depot to resolve these complaints, Consumer Depot would frequently not respond to the DCA, or if it did respond, it only did so after the DCA send Consumer Depot a second letter by certified mail. *Id.* ¶ 6.

39. On the occasions that Consumer Depot responded to DCA, Consumer Depot took the position that its sales were “As Is,” that it was a liquidator of customer returns, and/or that the consumers did not read the auction details carefully. *Id.*

40. Some consumers reported they were deterred from returning items to Consumer Depot because Consumer Depot would not refund their shipping costs. *Id.* ¶ 7.

41. As time progressed, the DCA continued to receive an increasing number of consumer complaints regarding Consumer Depot, including an increasing number of complaints about Consumer Depot’s eBay sales. *Id.* ¶ 8.

42. Once a high number of consumer complaints began to come in to the DCA, Consumer Protection Specialist Joyce Hughey was specially assigned to handle all Consumer Depot complaints. *Id.* ¶ 9.

43. By February of 2006, the DCA had received a total of 309 complaints about Consumer Depot, which is one of the highest complaint rates ever received by the DCA about a Tennessee company. *Id.* ¶ 10.

B. Consumer Depot's Ejection from the Better Business Bureau

44. The Better Business Bureau ("BBB") is a non-profit organization whose purpose is to promote an ethical marketplace by providing information and services to consumers and businesses. *See* Affidavit of Bert Hubbell, Vice President of the Better Business Bureau of Middle Tennessee, ¶ 2, **A190** (hereinafter "Hubbell (BBB) Aff.").²

45. Businesses who become members of the BBB must meet certain membership standards. *Id.* ¶ 3.

46. BBB membership standards require that member businesses operate in the area for six months, be licensed and bonded as required by law, provide information to the BBB on the nature of the business and background of the principals, have a good business reputation and abide by BBB advertising standards, by-laws and the fair trade practices code, as well as local, state and federal statutes. *Id.*

47. On January 17, 1997, Consumer Depot submitted an application for membership in the BBB. *Id.* ¶ 6.

48. Consumer Depot's BBB membership application was signed by Carol Fike as "Office Manager" and included, among other things, Consumer Depot's written promise that it would "subscribe to the principles of the Better Business Bureau." *Id.* ¶ 3 and Exhibit B thereto, **A190 - A195**.

49. Consumer Depot's membership with the BBB continued without incident for several years, until July 29, 2002, when the BBB received a complaint about Consumer Depot from consumer Jeff Butterfield. *See* Hubbell (BBB) Aff., ¶ 7, **A191- A192**.

50. In his complaint, Mr. Butterfield reported that he had purchased a conference telephone from Consumer Depot's retail store. *Id.*

51. Mr. Butterfield reported that he had purchased the conference telephone upon the recommendation of a Consumer Depot salesman and that this salesman assured Mr. Butterfield that if the telephone did not work, he could bring it back and exchange it for an in-store credit. *Id.*

52. Mr. Butterfield's conference telephone did not work, so Mr. Butterfield telephoned Consumer Depot and spoke with two employees, both of whom assured Mr.

² In addition to serving as Vice President of the BBB during that time, Mr. Hubbell was also the records custodian for the BBB and authenticated and identified Exhibits A - G to his Affidavit as BBB business records maintained in the ordinary course of business. *See* BBB Aff., ¶¶ 1 and 16 and Exhibits A - G, thereto, **A190 - A540**.

Butterfield that he could return the conference phone. *Id.*

53. The Consumer Depot employees also advised Mr. Butterfield that the conference telephone was a new product for Consumer Depot and that Consumer Depot had no history with the telephone and had not tested it. *Id.*

54. Consumer Depot directed Mr. Butterfield to go “on-line” to get an “RMA” (Return Merchandise Authorization) in order to be able to return his item. *Id.*

55. Notwithstanding all of the above, Consumer Depot subsequently advised Mr. Butterfield that his telephone was not returnable. *Id.*

56. Mr. Butterfield filed a complaint with the BBB, which the BBB forwarded to Consumer Depot on August 9, 2002. *Id.* ¶ 8.

57. Consumer Depot did not respond to the BBB. *Id.*

58. On August 16, 2002, the BBB attempted to contact Martin Fike and Consumer Depot by facsimile, but again, Consumer Depot did not respond. *Id.*

59. On September 11, 2002, the BBB sent a letter to Martin Fike and Consumer Depot by registered mail; once again Consumer Depot did not respond. *Id.*

60. On September 26, 2002, the BBB sent a second registered letter to Martin Fike and Consumer Depot advising that effective September 26, 2002, Consumer Depot’s BBB membership would be suspended for failing to honor BBB membership standards. *Id.* ¶ 7.

61. In the September 26, 2002 letter, the BBB also advised Martin Fike and Consumer Depot that since July 27, 2002, the BBB had initiated several contacts with Consumer Depot requesting its assistance with consumer Jeff Butterfield’s complaint, but neither Martin Fike nor Consumer Depot ever responded to the same. *Id.* ¶ 9.

62. On October 30, 2002, the BBB sent a third registered letter to Martin Fike and Consumer Depot advising them that on September 26, 2002, Consumer Depot’s membership with the BBB had been suspended for failing to maintain BBB standards. *Id.* ¶ 10.

63. On October 30, 2002, the BBB Board unanimously voted to revoke Consumer Depot’s membership in the BBB. *Id.*

64. After the BBB revoked Consumer Depot’s membership, the BBB received an undated letter from Martin Fike which stated as follows:

In response to your threatening letter. Consumer Depot is a liquidator. NOT a department store. We sell USED, REFURBISHED, DISCONTINUED and other distressed inventory at

discounted prices.

We offer 14 day return on most everything we sell. This 14 day policy allows any customer to bring back their purchase for 14 days. Beyond that, we do not guarantee every customer LIFETIME SATISFACTION.

Our policies are CLEAR and POSTED in large yellow signs so that everyone is aware. Every Customer must SIGN their RECEIPT in our store. This insures [sic] there is NO confusion as to our policies.

Id. ¶ 11.

65. During the ensuing five and one half month period, the BBB received another ten complaints against Martin Fike and Consumer Depot and continued to try and make contact with Consumer Depot and Martin Fike. *Id.* ¶ 12.

66. On February 18, 2003, the BBB sent a certified letter to Martin Fike and Consumer Depot advising that the BBB has been contacting them and requesting their immediate attention to the ten complaints on file with the BBB. *Id.*

67. In particular, the BBB advised Martin Fike and Consumer Depot that these additional ten complaints “reflect[ed] a pattern of customers paying for refurbished merchandise which is defective” and that all of the complaints were closed as “unanswered and unresolved.” *Id.*

68. Neither Martin Fike and Consumer Depot took any significant steps to help address the complaints against them. *Id.* ¶ 13.

69. Complaints continued to be filed with the BBB and eventually became so numerous, that since October 27, 2003, the BBB stopped processing consumer complaints and began sending its complaints directly to the Tennessee Attorney General’s Office. *Id.* ¶ 13.

70. The records which are attached as Exhibit G to the BBB Affidavit are all BBB summaries of all the consumer complaints received against Martin Fike and Consumer Depot during this time period. *Id.* ¶ 14.

71. The additional complaints received by the BBB which appear as Exhibit G to the BBB Affidavit were all received, retained and compiled in the course of the BBB’s regularly conducted business. *Id.* ¶ 16.

72. As of February 17, 2006, the BBB had received at least 165 complaints against Consumer Depot from consumers throughout the country. *Id.* ¶ 15.

73. The 165 consumer complaints received by the BBB are substantially similar in nature and can be summarized as a failure by Martin Fike and Consumer Depot to deliver as advertised:

- Consumers receive something less or other than what was advertised;
- Consumers receive broken, defective or empty product;
- Consumers receive visibly defective product.

Id. ¶ 14.

74. Martin Fike and Consumer Depot routinely refuse to remedy or correct these problems, impose cumbersome and rigid return procedures and refuse to issue refunds, even where the fault lies with them. *Id.*

75. Martin Fike and Consumer Depot routinely disclaim responsibility by relying on things like “as is” sales, disclaimers, or other excuses. *Id.*

76. Most consumers are left with worthless or useless product, un-refunded money and high shipping costs. *Id.*

77. It is the policy of the BBB to provide notice of, and forward each complaint it receives. *Id.* ¶ 16.

78. If no response is received, the BBB forwards the complaint a second time. *Id.* ¶ 16.

79. A complaint that remains unanswered or unresolved after informing the company a second time is considered “closed.” *Id.*

80. In this case, the BBB forwarded all of the written complaints it received to Martin Fike and Consumer Depot. *Id.*

81. Of those 165 complaints, and only ten were ever resolved by Consumer Depot. *Id.*

C. General Examples of Complaints About Consumer Depot’s Transactions

1. Consumer Mary Wilkes

82. On January 17, 2006, consumer Mary Wilkes visited the eBay internet site and saw that Consumer Depot, through its “**returndealz04**” eBay user id, was selling the movie “**Atlantis**” as a ***NEW SEALED*** DVD as item number 6469815528, and the movie “**Once Upon a Time in Mexico**,” also as a “***NEW SEALED**” DVD under item number 6469047772. See Affidavit of Mary Wilkes, ¶ 1 and Exhibits A and B, thereto, **A168 - A189**.

83. Consumer Depot’s eBay auction for the **Atlantis** movie stated the following:

ATLANTIS DVD MOVIE *NEW SEALED*

This [movie/DVD] is brand new; the Paper cover got wet. - Another unbelievable bargain just for you. This item is **BRAND NEW !!! Bid NOW**. The photo above is the item you are bidding on.

- [Have questions? Click here!](#)
- [Return defective product \(Get RMA#\)](#)

See Wilkes Aff. ¶ 2 and Exhibit A thereto, **A168 - a169** and **A174**.

84. Similarly, Consumer Depot's eBay auction for the **Once Upon a Time in Mexico** movie stated the following:

ONE [sic] UPON A TIME IN MEXICO DVD MOVIE *NEW SEALED*

This [movie/DVD] is brand new; the paper cover got wet. - Another unbelievable bargain just for you. This item is **BRAND NEW !!! Bid NOW**. The photo above is the item you are bidding on.

- [Have questions? Click here!](#)
- [Return defective product \(Get RMA#\)](#)

See Wilkes Aff. ¶ 2 and Exhibit B thereto, **A168 - A169** and **A179**.

85. In addition to the above description, Consumer Depot also posted three photographs of each DVD on its auction pages, both of which appeared to be new and in good condition. See Exhibits A and B at pp. 2 - 4, **A172 - A181**.

86. Consumer Depot's above descriptions and photographs led Mrs. Wilkes to believe that the **Atlantis** and **Once Upon a Time in Mexico** DVDs were "**brand new**," still in their original packages and were fully "**SEALED**," although Mrs. Wilkes understood that the paper covers for the DVD might be a little wet. See Wilkes Aff. ¶ 3, **A169**.

87. Consumer Depot's auction description also led Mrs. Wilkes to believe that both items were returnable if they were defective or there was a problem, because both auction descriptions directed purchasers to clicking the "**● Return defective product (Get RMA#)**" link in the auction description. See Exhibits A and B to Wilkes Aff. at p. 2, **A174** and **A179**.

88. Mrs. Wilkes also believed these items were returnable because Consumer Depot

placed the “● [Return defective product \(Get RMA#\)](#) link directly below the item descriptions. *See* Wilkes Aff., ¶ 3 and Exhibits A and B thereto at p. 2, **A169, A174 and A179.**

89. On January 17, 2006, Mrs. Wilkes submitted the winning bids for Consumer Depot’s above **Atlantis** and **Once Upon a Time in Mexico** DVDS. I spent a total of \$ 6.00 for both items.

90. When Mrs. Wilkes received her DVDs from Consumer Depot, both DVDs were in terrible condition and were totally unusable. Wilkes Aff. ¶ 5.

91. In particular, while both DVDs were sealed, they were “soggy, mildewed, and had a strong stench that could be smelled even before each was opened.” *Id.*

92. The cardboard cover on the **Once Upon a time in Mexico** DVD “had black mold actually growing on it.” *Id.*

93. Both DVDs had evidently been submerged or soaked in some liquid, and not gotten a little wet as the ad implied. *Id.*

94. Mrs. Wilkes promptly went to Consumer Depot’s eBay site to return these DVDs and clicked the “**Return defective product**” link at the end of the auction details as directed. *Id.* ¶ 6.

95. When Mrs. Wilkes entered the first item number as she was directed to do by Consumer Depot, Consumer Depot displayed a message which said:

AUCTION # 6469815528 was ‘SOLD AS IS’ and is NOT eligible for RMA/Return.
Please [click here](#) to refer to your AUCTION for more information.

Id. and see Exhibit C, thereto, **A169, A174, A179 and A182.**

96. Mrs. Wilkes went back to the auction page and saw that in a further section of the website, Consumer Depot stated in a separate “Returns” section that “All Sales Final - Sold As Is - No Returns.” Wilkes Aff. ¶ 6 *and see* Exhibits A and B at p. 3, **A170, A172 - A181.**

97. Mrs. Wilkes thought it was very misleading for Consumer Depot to place a link for returning defective products by each auction description on the one hand, and then to place separate “As-Is” and “No Returns” messages in separate portions of the auction pages next to photographs of unrelated auction items. *Id.*

98. Mrs. Wilkes also e-mailed Consumer Depot directly on January 13, 2006 through the eBay site as well as through returndealz04@auctionlogistix.com after she

discovered that the items were unreturnable. *Id.* ¶ 9.

99. Mrs. Wilkes received two replies from Consumer Depot on January 16, 2006 and attempted to communicate with Consumer Depot through www.auctionlogistix.com/clients/support/contact.asp as well. *Id.*

100. Mrs. Wilkes also went to the RMA/Return Issues, then again attempted to get RMA return number, but was again told the items were nonreturnable. *Id.*

101. Mrs. Wilkes was very upset about Consumer Depot's sales practices and decided to leave negative feedback about Consumer Depot on eBay, but as soon as she did, Consumer Depot retaliated, and left negative feedback against her. *Id.* ¶ 7.

102. Mrs. Wilkes had paid very promptly, a short time after each auction ended and felt Consumer Depot had no reason to leave negative feedback against her as she only told the truth about the condition of consumer Depot's goods. *Id.* and see eBay feedback pages at pp. 2, A170 and A183 - A187.

103. Mrs. Wilkes' eBay Member Profile shows she had a 100% positive feedback rating with eBay for my 81 eBay transactions, but as a result of Consumer Depot's negative feedback, her dropped and so has my 100% positive reputation. See Wilkes Aff. ¶ 7 and Exhibit E at p. 1, A170 and A183 - A187.

104. Mrs. Wilkes had previously never given a neutral or negative feedback to anyone until she had to give the above negative feedback to **returndealz04**. *Id.*

105. Mrs. Wilkes has since reviewed the eBay website and has seen that there are many other consumers who have had equally bad experiences with Consumer Depot. *Id.* ¶ 8.

106. Mrs. Wilkes also observed that each time one of those consumers left negative or neutral feedback left against Consumer Depot, Consumer Depot retaliated and left negative feedback against those consumers. *Id.*

2. Consumer William Bartling

107. In March of 2006, consumer William Bartling decided he was interested in purchasing a quality all-in-one copier/fax/printer for his home network. See Affidavit of William Bartling, ¶ 2, A552 - A559 (hereinafter "Bartling Aff.")

108. On March 26, 2006, Mr. Bartling visited one of Consumer Depot's eBay auctions, which Consumer Depot was conducting under the user id "**bargaindepot04**." *Id.* ¶ 1.

109. At that time, Mr. Bartling saw that Consumer Depot had placed a **Panasonic KX-FL511 Laser Copy/Fax/Printer All In One NR** product on eBay for auction, as item number 6863498401. *Id.* and see Exhibit A, thereto, A556 - A559.



Figure 1

110. In particular, Consumer Depot also displayed three photographs of the **Panasonic Copy/Fax/Printer** in its eBay auction page, as depicted in **Figure 1**, left, which is a copy of the entire eBay auction page for Mr. Bartling's **Panasonic Copy/Fax/Printer**. See **Figure 1** and see Exhibit A to Bartling Aff., A552 - A559.

111. In addition, Consumer Depot advertised a written description of the **Panasonic Copy/Fax/Printer**, which directed consumer to look at the included photographs and specifically provided as set forth in **Figure 2**, below:

**PANASONIC KX-FL511 LASER
COPY / FAX / PRINTER ALL IN ONE NR**

They say a picture is worth a thousand words? We don't have time to type that much. Look at this picture!! Another great auction item. Don't let this one get away. What you see in the photo is what is included. Not Happy? Send it back within 7 days for your money back! (Except on SOLD AS IS Items i.e., Software, Media, Ink & Toner. Please see the RETURNS Section on this auction for more info.)

- [Have questions? Click here!](#)
- [Return defective product \(Get RMA#\)](#)

Figure 2

See Exhibit A to Bartling Aff, A556 - A559.

112. Mr. Bartling decided to bid on the **Panasonic Copy/Fax/Printer**, and on March 26, 2006, submitted the winning bid for this item. See Bartling Aff. at ¶ 3, A552 - A553.

113. Mr. Bartling won the **Panasonic Copy/Fax/Printer** for a total bid of \$.99, but had to pay \$32.00 in shipping costs to Consumer Depot. *Id.*

114. M. Bartling paid Consumer Depot for his **Panasonic Copy/Fax/Printer**

within one hour of winning the auction. *Id.* ¶ 7.

115. When Mr. Bartling's purchase above purchased arrived from Consumer Depot, it was not as advertised because it was not a **Panasonic Copy/Fax/Printer**, but, rather, was a copy/fax machine only with no printing capability and could not be plugged into a computer; it also appeared to have a damaged drum. *Id.* ¶ 4.

116. Upon receipt of this item, Mr. Bartling immediately sent at least four emails to Consumer Depot describing the discrepancy between the auction posting and the product Consumer Depot shipped, but received no response from Consumer Depot. *Id.* ¶ 5.

117. Mr. Bartling also requested an RMA number ("Return Merchandise Authorization") from Consumer Depot, but when he did, he was told that all shipping charges back to Consumer Depot would be his responsibility, even though Consumer Depot sent him the wrong product. *Id.* (emphasis added).

118. Consumer Depot also stated that all returns had to be 100% complete, in original and resalable condition, with all original boxes and packing materials, manuals, registration card(s), software, blank warranty cards, cabling and other accessories and documentation if included, and that it reserved the right to refuse the return of any product that did not meet these requirements. *See* Bartling Aff. at ¶ 6, A553.

119. Complying with this additional requirement was impossible, because when Mr. Bartling received his shipment, the product was not 100% complete, nor in original or resalable condition, had no original boxes or packing materials, had no manuals, no registration cards, software, cabling or accessories. *Id.*

120. Even if Mr. Bartling returned the product and paid shipping, Consumer Depot could still reject his return. *Id.*

121. If Consumer Depot rejected his return, Consumer Depot's RMA slip stated that Consumer Depot would ship the item back "freight collect" and Mr. Bartling would therefore incur treble shipping charges for the item, which in this situation would be over \$80.00 and over 80 times the original product cost. *Id.*

122. Mr. Bartling felt he had no choice but to leave accurate and negative feedback about Consumer Depot on eBay indicating that the product was misrepresented and that the seller was unresponsive. *Id.* at ¶ 7.

123. As soon as Mr. Bartling left negative feedback against Consumer Depot, Consumer Depot promptly left negative feedback on eBay against him, even though he had paid Consumer Depot in full within an hour of the auction closing. *Id.*

124. After receiving the negative feedback from Consumer Depot, Mr. Bartling sent Consumer Depot an additional six emails trying to communicate with Consumer Depot, but only received automated form letters in return, none of which addressed, resolved nor offered to resolve his complaints. *Id.*

125. Mr. Bartling felt he had been deceived, misled and defrauded by Consumer Depot. *Id.*

3. Consumer Katrina Moultrie

126. On December 30, 2005, consumer Katrina Moultrie visited the eBay internet site and saw that Consumer Depot, through its “**returndealz04**” user id, was selling a **Kaleidoscope [PA] - Kelis (CD 1999) CD NEW** through auction, as item number 4813510411. *See* Affidavit of Katrina Moultrie, ¶ 1 and Exhibit A thereto, **A98 - A109**.

127. **Figure 3**, below, is an excerpt from the first screen of the eBay auction that Ms. Moultrie viewed:

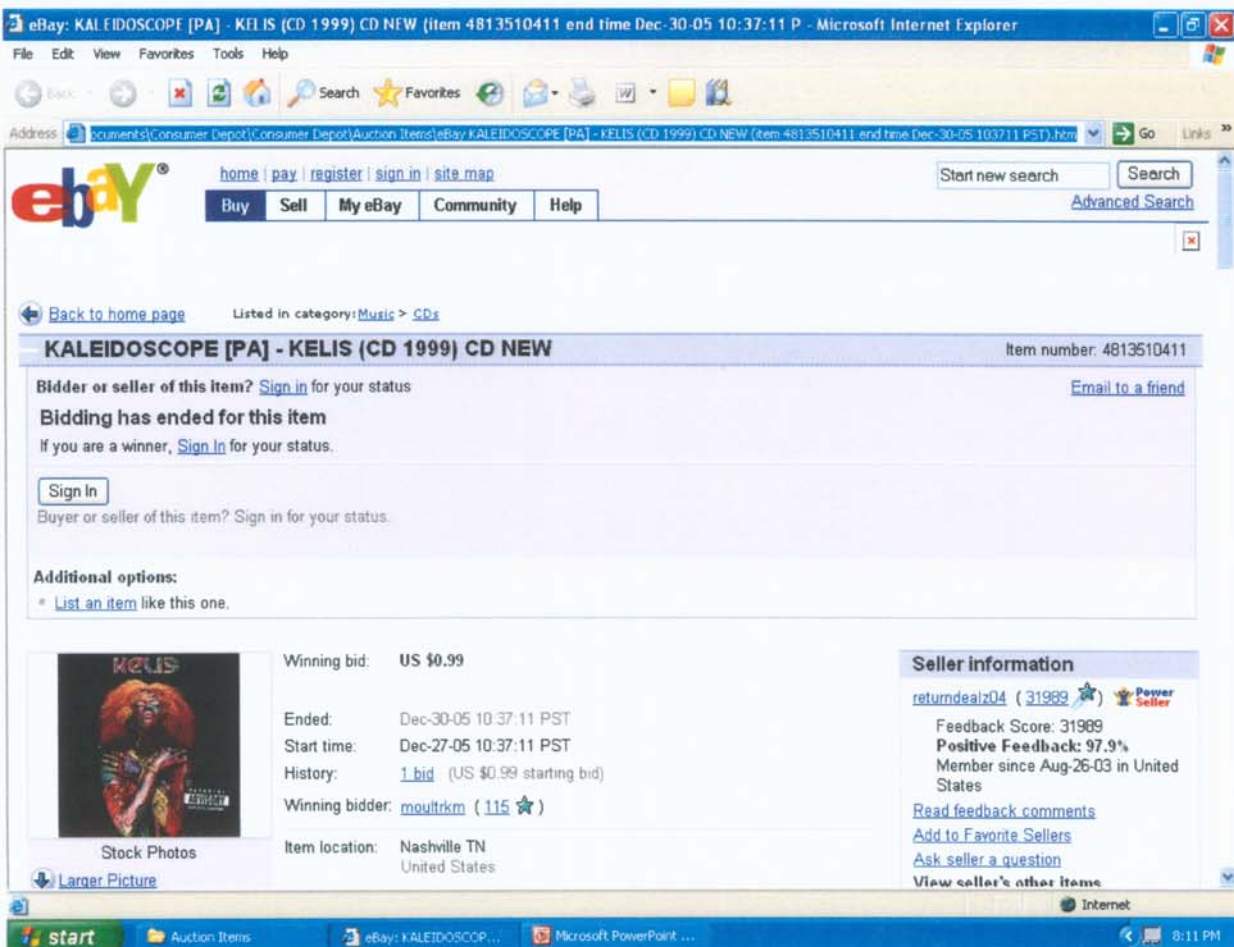


Figure 3

See Moultrie Aff., ¶ 1 and Exhibit A, p. 1, **A98** and **A101**.

128. Consumer Depot's eBay auction for Ms. Noultrie's KELIS CD stated:

Auction Details

cd is new but case is cracked - Another unbelievable bargain just for you. This item is BRAND NEW !!! Bid NOW. The Photo above is the item you are bidding on.

- [Have questions? Click here!](#)
- [Return defective product \(Get RMA#\)](#)

Id. ¶ 2 and Exhibit A at p. 2, A98 - 99 and A102.

129. In addition to the above description, Consumer Depot also posted a photograph of the KELIS CD, which stated it was a stock photo. *Id.*

130. **Figure 4**, below, is an excerpt from the auction description page Ms. Moultrie viewed, as described above. *Id.* ¶ 2 and Exhibit A at p. 2, A98 - 99 and A102.



Figure 4

131. Consumer Depot's above description and photograph led Ms. Moultrie to believe that the **Kelis CD** it was selling was "Brand New" and still in its original packaging, and that if there was a problem, she could return the CD by clicking the "● [Return defective product \(Get RMA#\)](#)" link in the auction description. *See* Moultrie Aff. ¶ 3 and Exhibit A at p. 2, A99 and A102.

132. On December 30, 2005, Ms. Moultrie submitted the winning bid for Consumer Depot's **Kelis CD** and paid a total of \$ 9.98 for the item: \$.99 for the winning bid and \$8.99 for shipping. *Id.*, ¶ 4.

133. When Ms. Moultrie's KELIS CD arrived from Consumer Depot, the CD smelled musty even before she even opened the seal. *Id.*, ¶ 5.

134. When Mrs. Moultrie opened the seal and opened the CD, it was wet inside. *Id.*

135. In addition, the insert in the CD was wet and stuck to the inside of the case. *Id.*

136. Ms. Moultrie promptly went to the Consumer Depot site to return the **Kelis CD**. *Id.* ¶ 6.

137. Ms. Moultrie clicked the prominent "● [Return defective product \(Get RMA#\)](#)" link at the end of the auction details and entered her auction number as directed by Consumer Depot's site. *Id.*

138. However, after Ms. Moultrie entered her auction number, Consumer Depot displayed a message as set forth in **Figure 5**, below:

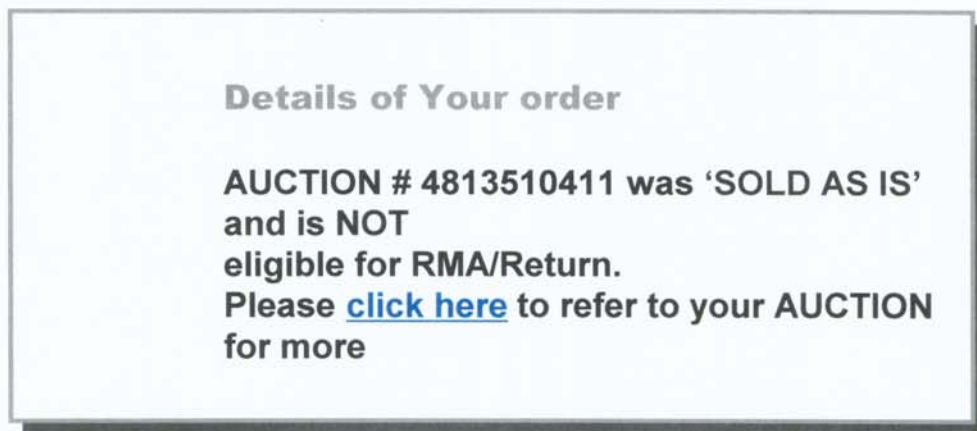


Figure 5

Id. and see Exhibit B hereto, A107.

139. Ms. Moultrie went back to the auction page and saw that Consumer Depot stated in a separate "Returns" section that "All Sales Final - Sold As Is - No Returns." *Id.* ¶ 6

and see Exhibit A thereto at p. 3, A99 and A103.

140. Ms. Moultrie thought it was very misleading for Consumer Depot to place a link for returning defective products next to the auction description of the item on the one hand, and then to place a separate “As-Is” and “No Returns” message in a separate portion of the auction page next to photographs of unrelated auction items. *Id.*

141. Ms. Moultrie tried to contact Consumer Depot by e-mail but got no response. *See Moultrie Aff.*, ¶ 7, A100.

142. Ms. Moultrie decided to leave negative feedback about Consumer Depot on eBay, but as soon as she did, Consumer Depot retaliated, and left negative feedback against her which was false. *Id.* and see Exhibit C at p. 1, A108.

143. In particular, the negative feedback eBay left on Ms. Moultrie’s eBay feedback history falsely stated:



Our Terms and conditions are CLEARLY stated, please read.

Id.

144. As seen in Ms. Moultrie’s attached eBay Member Profile, Ms. Moultrie had a perfect 100% positive feedback rating with eBay for her eBay transactions until Consumer Depot left negative feedback. *See Moultrie Aff.* ¶ 7, A100 and member profile for **moultrkm**, A108.

145. As a result of Consumer Depot’s negative feedback, Ms. Moultrie’s eBay feedback rating has dropped and so has her 100% positive reputation. *Id.*

146. Ms. Moultrie has since reviewed the eBay website and observed that there were many other consumers who have had equally bad experiences with Consumer Depot. *Id.* ¶ 8.

147. Ms. Moultrie also observed that each time one of these consumers left negative feedback left against Consumer Depot, Consumer Depot retaliated and left negative feedback against the consumer. *Id.*

148. Consumer Depot never responded to Ms. Moultrie’s many requests for help and has failed to refund her money. *Id.* ¶ 9.

149. Ms. Moultrie felt she was misled and deceived by Consumer Depot. *Id.*

D. Examples of Advertising One Thing, But Delivering Another

150. Many consumers in addition to Mr. Bartling have complained that after winning a Consumer Depot eBay auction and paying for their item, Consumer Depot sent entirely different items. *See, e.g.,* Baldwin (Attorney General) Aff., ¶ 6, A27 - A29, Hughey (DCA) Aff., ¶ 5, A35, Hubbell (BBB) Aff., ¶ 14, A194, Koehler Aff. ¶¶ 1 - 2, A51 - A58 and Exhibit A thereto, Layton Aff., ¶ 6, A60 and Muto Aff., ¶ 6, A111.

1. Consumer Gerald Koehler

151. On November 3, 2005, consumer Gerald Koehler visited Consumer Depot's "returndealz04" eBay auction site. *See* Affidavit of Gerald Koehler, ¶ 1 ("Koehler Aff.").

152. At that time, Mr. Koehler saw that Consumer Depot was selling **Quicken Premier 2006 Personal Finance Software** for auction as item 8230320942. *See* Koehler Aff. At ¶ 1.

153. **Figure 6**, below, is an excerpt from the item description portion of Consumer Depot's eBay auction for the **Quicken Premier 2006** software purchased by Mr. Koehler:

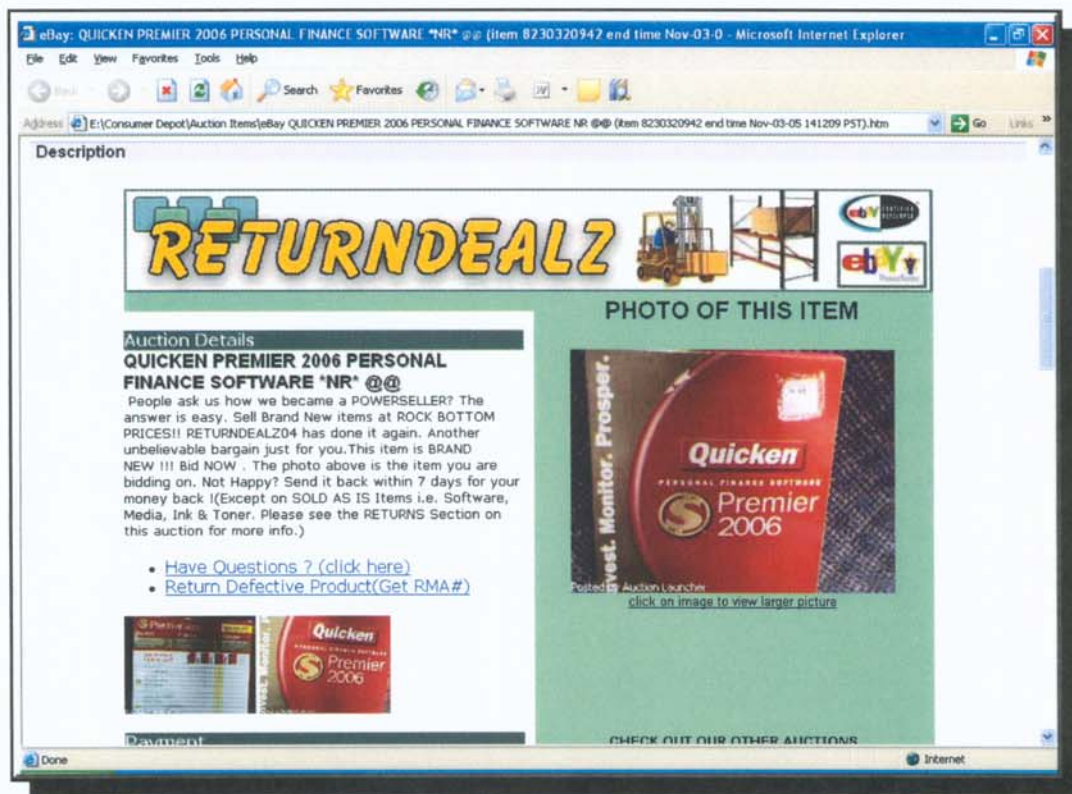


Figure 6

See Koehler Aff. at ¶ 1 - 2 and Exhibit A thereto, A51 - A58.

154. On November 3, 2005, Mr. Koehler submitted the winning bid for the above **Quicken Premier 2006 Personal Finance Software**. *See* Koehler Aff. at ¶ 5, A52.

155. When Mr. Koehler received his shipment from Consumer Depot, his package did not contain Quicken software at all, but, instead, contained *a broken cordless phone*. *Id.* ¶ 6.

156. Mr. Koehler made numerous attempts at contacting Consumer Depot by phone and through its webform, but was not able to get any meaningful response. *Id.* ¶ 7.

157. Eventually, Mr. Koehler posted negative feedback against Consumer Depot on eBay and even though Consumer Depot had sent Mr. Koehler the wrong item, Consumer Depot promptly posted negative feedback against him on eBay. *Id.* ¶ 8.

158. To date, Consumer Depot has not refunded Mr. Koehler's payment nor otherwise responded to Mr. Koehler's requests for help and Mr. Koehler felt that Consumer Depot misled and deceived him. *Id.* ¶ 9.

2. Consumer Mark Muto

159. On February 9, 2005, consumer Mark Muto visited Consumer Depot's "**bargaindepot04**" eBay auction site. *See* Affidavit of Mark Muto, ¶ 1, A110.

160. At that time, Mr. Muto saw that Consumer Depot was selling a **Belkin 2-Port KVM Switch F1DL102U USB Cables** for auction as item number 5163638389. *Id.*

161. **Figure 7**, below, is an excerpt from the item description portion of Consumer Depot's eBay auction for the **Belkin 2-Port KVM Switch** purchased by Mr. Muto:



Figure 7

See Muto Aff. At ¶¶ 1 - 4 and Exhibit A thereto, A110 - A117.

162. On February 9, 2005, Mr. Muto submitted the winning bid for the above **Belkin 2-Port KVM Switch**. See Muto Aff. ¶ 5, A111.

163. When Mr. Muto received his shipment from Consumer Depot, his package did not contain the **Belkin 2-Port KVM Switch** at all, but, instead, contained *an entirely different, incompatible PS2 computer switch*. *Id.* ¶ 6.

164. Mr. Muto immediately contacted Consumer Depot through its webform to return the item and obtain a refund. *Id.* ¶ 7.

165. Even though Consumer Depot sent Mr. Muto the wrong item, it refused to give Mr. Muto a full refund. *Id.*

166. Consumer Depot refused to refund either Mr. Muto's original \$12.00 shipping charge or the \$8.00 in shipping it would cost to send the item back to Consumer Depot. *Id.*

167. Mr. Muto went ahead and shipped the wrong item back to Consumer Depot at his own expense and did so within seven days from the date he first received the item from Consumer Depot. *Id.* ¶ 8.

168. Consumer Depot refused to accept Mr. Muto's return, claiming it had not "received" his return within seven days of Mr. Muto's receipt of the item. *Id.*

169. At most, Mr. Muto estimates Consumer Depot would have received his return within eight or nine days at the most, from the date he originally received the item. *Id.*

170. Mr. Muto was very unhappy with Consumer Depot and posted negative feedback about Consumer Depot on eBay. *Id.* ¶ 9.

171. Even though everything Mr. Muto had done as a purchaser was proper and he received the wrong item through no fault of his own, Consumer Depot posted negative feedback against Mr. Muto on eBay. *Id.*

172. Mr. Muto felt that he had been defrauded by Consumer Depot. *Id.* ¶ 10.

3. Consumer Barbara Layton

173. On November 5, 2005, consumer Barbara Layton visited Consumer Depot's eBay auction for its "**returndealz04**" auction site. See Affidavit of Barbara Layton, ¶ 1, A59 - A66.

174. At that time, Ms. Layton saw that Consumer Depot was selling a **Texas Instruments Model 30XA Scientific Calculator** as item number 7559642164. *Id.*

175. **Figure 8**, below, in an excerpt from the item description portion of Consumer Depot's eBay auction for the **Texas Instruments Model 30XA Scientific Calculator** purchased by Mrs. Layton:

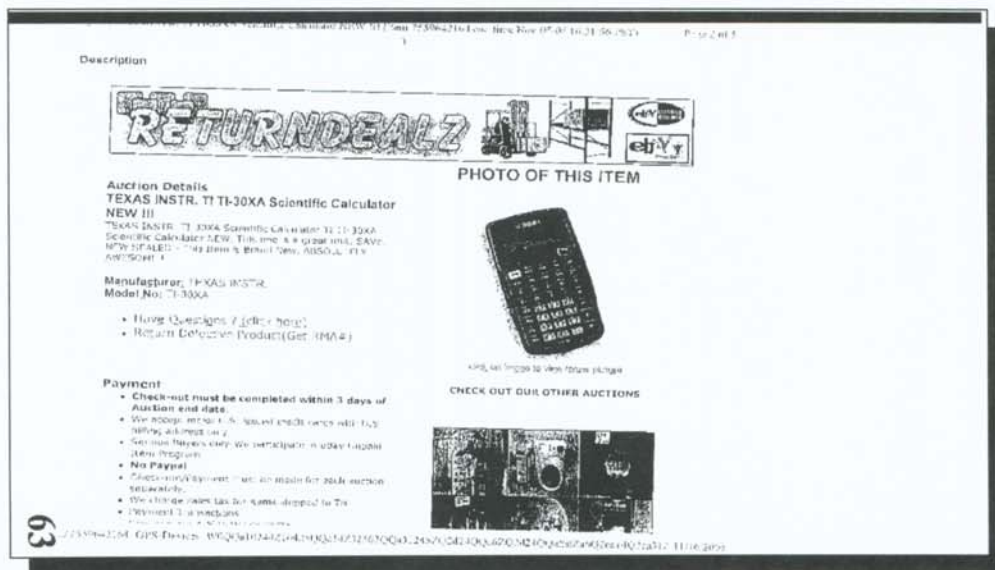


Figure 8

See Layton Aff. at ¶¶ 1 - 2 and Exhibit A thereto, A50 - A66.

176. The 30XA Model was important to Ms. Layton, because her husband was an engineer and needed a “pi” key to perform certain calculations. *Id.* ¶ 6.

177. Consumer Depot's eBay advertisement referred to the 30XA Model at least five different times and included at least three photographs of the 30XA Model. *Id.* ¶¶ 2 - 3 and Exhibit A thereto.

178. When Ms. Layton received her shipment from Consumer Depot, it contained a different model calculator which did not have a “pi” key. *Id.* ¶ 6.

179. Ms. Layton attempted to contact Consumer Depot by e-mail, through its webform and by five known telephone numbers, but Consumer Depot did not respond to any of these contact attempts. *Id.* ¶ 7.

180. Mrs. Layton also tried to resolve the problem with Consumer Depot through eBay's complaint resolution site, but was not successful in resolving the same. *Id.*

181. Mrs. Layton posted negative feedback about Consumer Depot on eBay stating it sent her the wrong item and failed to respond to her e-mails and Consumer Depot promptly posted negative feedback against Mrs. Layton. *Id.* ¶ 8.

182. Mrs. Layton felt she was “misled and deceived by Consumer Depot.” *Id.* ¶ 9.

4. BBB Complaints Examples

183. Records from the BBB contain numerous additional examples of complaints from consumers who reported that they had purchased one thing from Consumer Depot, but then received a different item or the wrong item without an remedy from Consumer Depot:

"Seller fraud describes item and then send something else not as advertised."

Consumer Kenneth Brassner
BBB Complaint, Nov. 7, 2003, **A230**

"They sent the wrong item and will not communicate and fix."

Consumer Daniel Siegel
BBB Complaint, Oct. 12, 2003, **A478**

"[Y]ou could clearly see that a ... 250gb drive [label] was placed on a 20 gb drive."

Consumer Neil Sneider
BBB Complaint, Nov. 11, 2003, **A533**

"[G]ot a mouse instead of an ethernet card."

Consumer Kin Yu
BBB Complaint, Nov. 11, 2003
A533

"Bought an item on Ebay received a different item."

Consumer Robert Schmitz
BBB Complaint, Oct. 12, 2003, **A468**

"The item shipped to me was NOT the item I had won at auction."

Consumer Sean Puckett
BBB Complaint, Dec. 18, 2003, **A439**

"I purchased a CF hard drive from this company ... and received a 'travel kit' ..."

Consumer Joel Richards

E. Examples of Misrepresentations That Items Are New

184. Numerous consumers have complained that Consumer Depot advertises that “New” merchandise is being sold, but then sends used, broken or defective merchandise instead. *See, e.g.*, Baldwin (Attorney General) Aff., A29, Hughey (DCA) Aff., A37 - A38, Citro Aff., A50, Koehler Aff., A55, Layton Aff., A59 - A60, Martin Aff., A85 - A87, McDermott Aff., A88 - A92, Moultrie Aff., A98 - A100, Schuler Aff., A127 - A129, Scripture Aff., A135 - A136 and Wilkes Aff., A168 - A169.

185. Consumers complain that Consumer Depot uses terms like “**Brand New**,” “**SEALED**,” or “**New/Open Box**,” for example, and often posts photographs which display merchandise in new, unopened packages. *See, e.g.*, McDermott Aff., A88 - A89, Moultrie Aff., A109, Schuler Aff., A127 - A134 and Wilkes Aff., A168 - A169.

186. In addition to descriptive terms, Consumer Depot also uses logos and banners which refer to new merchandise, as seen, for example, in [Figure 9](#), below, from one of Consumer Depot’s frequently used eBay banners for its “bargaindepot04” user id:



[Figure 9](#)

See, e.g., Bartling Aff. and Exhibit 1 thereto. A552 - A559.

187. As seen in the above Consumer Depot eBay banner, Consumer Depot describes BARGAIN DEPOT merchandise as “**OVERSTOCK**,” “**END OF LIFE**” and “**SURPLUS**,” and does not indicate or imply that used, damaged, refurbished or defective merchandise is being sold. *Id.*

188. Another descriptive logo and banner used by Consumer Depot in its eBay advertising is the FACTORY DEALZ banners, as set for in [Figure 10](#), below:



[Figure 10](#)

See, e.g., Exhibit 1 to Affidavit of Marvin McDermott, A91 - A95.

189. Consumer Depot's above eBay banner, **factorydealz** trade name and eBay user id imply that items are being obtained and/or sold directly from the factory.

190. Consumer Depot's above eBay banner, **factorydealz** trade name and eBay user id does not indicate or imply that used, damaged, refurbished or defective merchandise is being sold.

191. In her complaint to the Better Business Bureau, one consumer described her impression of Consumer Depot's advertising as follows:

All of [Consumer Depot's merchandise is broken yet they mislead consumers to think that their products are simply the result of overstocks or customer returns.

See Christina Bowers BBB Complaint, A237.

1. Consumer Amity Armes

192. On March 4, 2006, consumer Amity Armes visited Consumer Depot's eBay auction site under its "**bargaindepot04**" eBay id. See Affidavit of Amity Armes, ¶ 1, A552.

193. At that time, Ms. Armes saw that Consumer Depot was selling a **New Apple Brand iPod Shuffle Armband** as item number 8774217861. *Id.*

194. **Figure 11**, below, is an excerpt from the item description of Consumer Depot's eBay auction for the **New Apple Brand iPod Shuffle Armband** viewed by Ms. Armes:

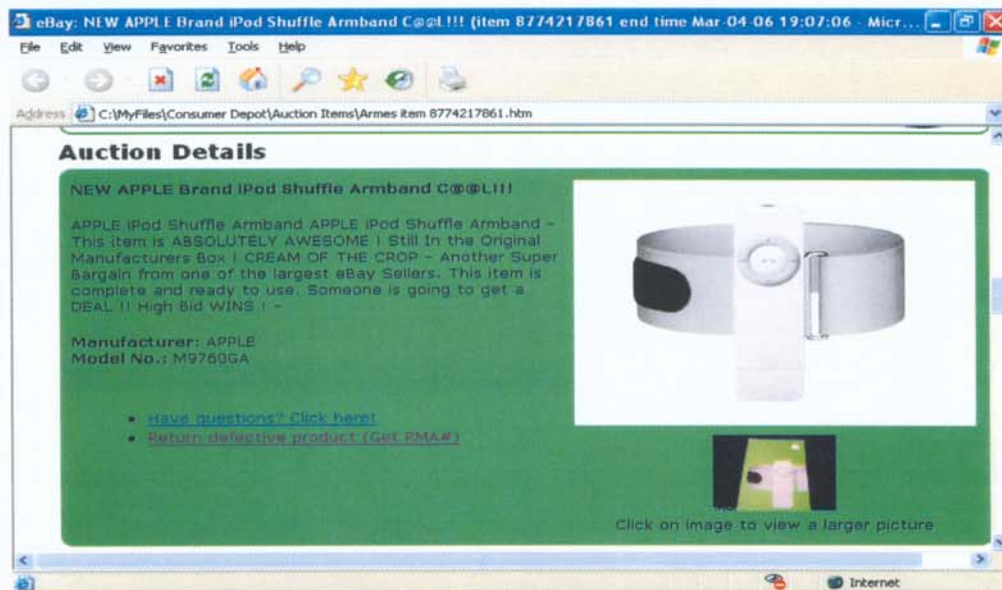


Figure 11

See Armes Aff. at ¶¶ 1 - 2 and Exhibit A thereto, A552 - A559.

195. Consumer Depot's auction pages included at least four photographs of the **New Apple Brand iPod Shuffle Armband**. *Id.* at ¶ 3 and Exhibit A thereto.

196. Consumer Depot's advertising led Ms. Armes to believe it was offering a brand new product and did not mention nor otherwise disclose any problems or defects with the armband. *Id.* ¶ 3.

197. When Ms. Armes received her shipment from Consumer Depot, she observed the following:

When my Apple iPod Armband arrived from consumer Depot, it was not as advertised. It had *blood and sweat stains* on it and was obviously used, not new as advertised by Consumer Depot. The item was quite disgusting.

See Armes Aff. at ¶ 5 (emphasis in the original), A553.

198. Ms. Armes reported that while she was able to send the item back and get a refund of her \$11.01 purchase price, Consumer Depot refused to refund any of the shipping charges, even though it had misrepresented the item and she had incurred additional shipping charges through no fault of her own. *Id.* ¶ 6.

199. Ms. Armes left negative feedback on eBay against Consumer Depot and Consumer Depot promptly retaliated and left negative feedback against her. *Id.* ¶ 7.

200. Ms. Armes felt she had been defrauded, deceived and misled by Consumer Depot. *Id.* ¶ 8.

2. Consumer Chris Martin

201. On July 22, 2005, consumer Chris Martin visited Consumer Depot's website at **www.consumerdepot.com**, and decided to buy some Maxell headphones. *See Affidavit of Consumer Chris Martin*, ¶ 1, A85 - A87.

202. Consumer Depot's website advertisement stated that the Item Condition was **"New/Open Box: Complete, in Original Packaging with All Accessories,"** and that the headphones came with a **fourteen-day warranty**. *Id.*

203. Mr. Martin decided to go ahead and buy three sets of Maxell headphones from Consumer Depot. *Id.* ¶ 2.

204. When Mr. Martin received his headphones, however, they were not **"New/Open Box,"** but were all visibly defective. *Id.* ¶ 3.

205. More particularly, each box for each headphone was clearly labeled

“**RETURN**,” and each box had the exact defect written out and described on the “**RETURN**” label. *Id.* ¶ 3.

206. The next day Mr. Martin attempted to contact Consumer Depot via e-mail to express his dissatisfaction, but Consumer Depot responded with an automated message stating it would refund the original purchase price and shipping charges for defective items, but that he had to get an “RMA” (return merchandise authorization). *Id.* ¶ 4.

207. When Mr. Martin went to get an RMA, Consumer Depot’s RMA form said that he would get a store credit only, and that Consumer Depot would *not* refund his original shipping chargers. *Id.* ¶ 5.

208. Mr. Martin again attempted to e-mail Consumer Depot, but Consumer Depot again responded with another non-responsive, automated e-mail. *Id.* ¶ 6.

209. Mr. Martin never received a refund from Consumer Depot. *Id.* ¶ 7.

3. Consumer Marvin McDermott

210. On November 18, 2005, consumer Marvin McDermott won defendants’ eBay auction for a DVD of the movie “Ghost Ship.” *See* Affidavit of Marvin McDermott, ¶ 1, A88 - A95.

211. **Figure 12**, below, is an excerpt from the auction description for the auction viewed by Mr. McDermott and includes terms such as “**Brand New**” and “***SEALED***.” *Id.* ¶¶ 2-6 and Ex. A thereto, A88 - A95.

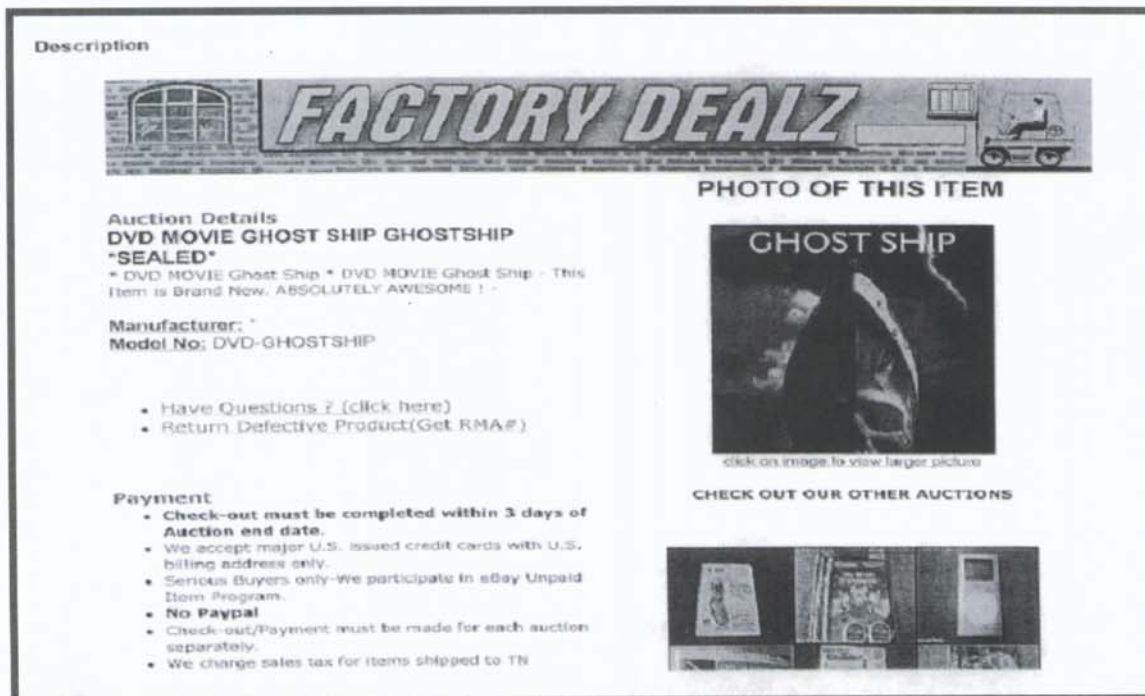


Figure 12

212. When Mr. McDermott received his DVD from Consumer Depot, it was wet and moldy. *Id.* ¶¶ 2 - 6 and Ex. A thereto.

213. There was even visible mold growing on the outside of the DVD case. *Id.* ¶ 6.

214. Mr. McDermott tried to contact Consumer Depot by telephone and through the internet, but could not get any meaningful response. *Id.* ¶ 7.

215. Eventually Mr. McDermott reached Consumer Depot, but Consumer Depot told him there was nothing it could do. *Id.*

216. Mr. McDermott went to the eBay auction site and saw that there were many other consumers who had complained of wet and moldy products from Consumer Depot. *Id.* ¶ 8.

217. Mr. McDermott also observed that every time a consumer posted negative feedback against Consumer Depot on eBay, Consumer Depot promptly retaliated and posted negative feedback against the consumer. *Id.*

218. Fearing such retaliation, Mr. McDermott simply posted “neutral” feedback against Consumer Depot. *Id.*

219. Consumer Depot never responded to Mr. McDermott’s requests for help and never gave him a refund. *Id.* ¶ 9.

4. BBB COMPLAINTS

220. Records from the BBB contain a numerous additional examples of complaints reporting that Consumer Depot advertised merchandise as new, but then sent merchandise which was used, defective or otherwise damaged:

"This is how they 'get' you! They bank on customers not returning defective merchandise or JUNK merchandise they are selling as NEW."

Consumer Teresa Allen
BBB Complaint, July 15, 2005, **A216**

"Item ordered was refurbished not new."

Consumer Thomas Antal
BBB Complaint, Nov. 18, 2003, **A222**

"They sold me a used-broken item as a new item."

Consumer Paul Barron
BBB Complaint, Match 31, 2004, **A225**

"The item was advertised a "New in Box ...which is why I bought it. When the CD Arrived, the box was smashed and the CD was full of scratches and OPENED."

Consumer Luanne VanDeVelde
BBB Complaint, Aug. 18, 2005, **A508**

"Misadvertised a used and broken product as 'New/Open Box.'"

Consumer Stewart Peters
BBB Complaint, July 23, 2003, **A434**

"Phone was advertised as "New-Like New," but arrived with corroded batteries, 25 messages on the machine, a handset not registered to the base, and it doesn't make outgoing calls."

Consumer David Willerup
BBB Complaint, Jan. 15, 2004, **A522**

"Advertised new product but shipped refurbished printers."

Consumer Thomas Ferris
BBB Complaint, April 9, 2004, **A303**

"The computer is defective not NEW!!!!

Consumer Mike Fielding
BBB Complaint, April 9, 2004, **A304**

"These can not legally be sold as new, and I question whether they could even be considered refurbished"

Consumer Mark Jurkowski
BBB Complaint, March 28, 2005, **A335**

""Product stickers were removed from another machine and applied to this machine in an attempt to make it appear new."

Consumer David Kulp
BBB Complaint, Jan. 23, 2003, **A367**

"Sold incomplete used product as "new, factory sealed."

Consumer Grant Berry
BBB Complaint, Sept. 16, 2004, **A229**

"This was absolutely and unfairly misrepresented as being new."

Consumer Karen Leighton
BBB Complaint, Dec. 29, 2005, **A385**

"The item is described as New/Open Box ... The item is DOA"

Consumer Chun Zhang
BBB Complaint, Jan. 8, 2006, **A534**

"The company advertised ... new open in box 8x dvd for \$65.00. I purchased 2 of then [sic]. When it got here the box had been open and both dvd roms was [sic] broken"

Consumer Guy Wuilliams
BBB Complaint, May 25, 2004, **A527**

"The item was advertised on ebay as brand new ... but when I received the camera ... the camera just did not work."

Consumer Nakiella Strickland
BBB Complaint, April 6, 2004, **A497**

"Advertised item as new, item received was badly used."

Consumer Jeffrey Weilert
BBB Complaint, Sept. 16, 2004, **A516**

"The iPod was described as new. When I received it, it was very scratched up, the cords were broken, it was very dirty and it does not work. I paid over \$200 for this item."

Consumer Leslie Purkey
BBB Complaint, Sept. 28, 2005, **A441**

"The item was advertised as NEW.... When I went to activate the phone ... I was told the unit is NOT new, and that there is a balance due in regard to the serial number"

Consumer Theresa Wisiti
BBB Complaint, Jan. 15, 2004, **A524 - A525**

F. Examples of Misrepresentiions That Products Were Tested, Inspected, or Otherwise Checked By Trained Technicians

221. Another significant area of complaint involves representation made by Consumer Depot that items were tested, inspected or otherwise checked by specially trained technical personnel. *See, e.g.*, Citro Aff., A45 - A50, Machata Aff., ¶¶ 2-12, A77 - A84, Lock Aff., ¶¶ 1-7, A69 - A76; Myers Aff., ¶¶ 1-9, A118 - A123, Weiss Aff., A155 - A156, Weissman Aff., A161 - A162, Streiff Aff. ¶ 6, A623 and BBB Complaints at A290, A333, A430, A432, A487, A520 and A536.

222. Consumers who have made these complaints were led to believe that the items being offered for sale by Consumer Depot were functional and suitable for purchase. *See, e.g.*, Machata Aff., ¶¶ 2-12, A77 - A84, Lock Aff., ¶¶ 1-7, A69 - A76, Myers Aff., ¶¶ 1-9, A118 - A123 and Streiff Aff. ¶ 4, A623.

1. Consumer Marvin Weissman

223. On June 7, 2004, consumer Marvin Weissman visited the eBay internet auction site and saw that Consumer Depot was selling a **Casio FX-7400G Plus Graphing Calculator** under its "bargaindepot04" user id as item number 3819923171. See Affidavit of Marvin Weissman at ¶ 1 and Exhibit 1 thereto, A161 - A167.

224. Mr. Weissman observed that Consumer Depot's eBay advertisement made the following representation regarding the a **Casio FX-7400G Plus Graphing Calculator**:

This item came in on a huge liquidation from a MAJOR RETAILER. Inspected by our technicians to insure [sic] TOP QUALITY. If the original retail box did not meet our standards - the item was repackaged for shipping. The item is the one you want if you are looking to SAVE BIG!! (May be missing software/manual or accessories - check manufacturers website for available drivers or software downloads) CASIO FX-7400G Plus Graphing Calculator Over 400 Functions.

Id. ¶ 2 and Exhibit 1 at p. 2.

225. Mr. Weissman also observed that Consumer Depot's photographs of the **Casio FX-7400G Plus Graphing Calculator** displayed the calculator as new, in its original retail packaging. *Id.* ¶ 3 and Exhibit 1 at p. 2.

226. As a result of Consumer Depot's above representations, Mr. Weissman believed Consumer Depot was selling a brand new, inspected and fully functional product and that he would indeed "SAVE BIG" as Consumer Depot promised. *Id.* ¶ 4.

227. Mr. Weissman proceeded to bid on Consumer Depot's auction and submitted

the winning bid for the **Casio FX-7400G Plus Graphing Calculator**. *Id.* ¶ 3.

228. When Mr. Weissman received his Calculator from Consumer Depot, it arrived with a tag attached to it which said **“DEFECTIVE”** and the calculator did not work. *Id.* ¶ 6.

229. The calculator was totally useless to Mr. Wiseman. *Id.*

230. Mr. Weissman then tried to communicate with Consumer Depot about this problem, but Consumer Depot would not respond to his emails. *Id.* ¶ 7.

231. Mr. Weissman later learned that Consumer Depot wanted him to pay the return shipping cost. *Id.*

232. Mr. Weissman felt it was deceptive for Consumer Depot to require him to pay return shipping on a defective item because Consumer Depot’s auction advertising said nothing about having to pay return shipping on a defective item. *Id.* ¶ 7 and see Exhibit 1 thereto.

233. Consumer Depot refused to provide Mr. Weissman with a refund. *Id.* ¶ 8.

2. Consumer Mark Citro

234. In mid-June of 2004, consumer Mark Citro visited the eBay internet site looking for a PDA (personal digital assistant). *See* Affidavit of Mark Citro, ¶ 1, **A45 - A50**.

235. At that time, Mr. Citro observed that Consumer Depot, through its **“bargaindepot04”** user id, was selling a **SONY PEG-SJ20 Clie Handheld PDA** (hereinafter the **“SONY PDA”**) as item number 5704211958. *Id.* ¶ 1 and Exhibit A thereto.

236. Consumer Depot’s eBay auction description for the **SONY PDA** stated the following:

If you are looking for a deal - LOOK NO FURTHER! This item is a *store display model* from a major retail store. It has been inspected by our technicians to insure that it is FUNCTIONAL. It may have signs of usage. (May be missing software/manual or accessories - check manufacturers website for available drivers or software downloads) SONY PEG-SJ20 Monochrome 16MB PDA 3rd Party Stylus/Pen NO PLUG ADAPTER

See Exhibit A at pp. 1 - 2, **A48 - A50**. (emphasis added).

237. In addition to being described as an “*inspected*” *store display model* and emphasized to be “FUNCTIONAL,” Consumer Depot also displayed a photograph of the **SONY PDA**, which depicted it as being “ON” and working:



Figure 13.

238. **Figure 13**, left, is an actual excerpt from Mr. Citro’s eBay auction and Mr. Citro’s PDA is clearly displayed as being powered “ON” and working. *See Exhibit A to Citro Aff, A48 - A50.*

239. Consumer Depot’s written statements and photographs led Mr. Citro to believe that the **SONY PDA** Consumer Depot was selling was an inspected store display model that was fully functional and that he would indeed get a deal as Consumer Depot promised. *See Citro Aff at ¶ 5, A46.*

240. On June 13, 2004, Mr. Citro submitted the winning bid for Consumer Depot’s **SONY PEG-SJ20 Clie Handheld PDA** in the amount of \$36.00 for the calculator and an additional \$12.00 in shipping charges. *Id.*

241. When Mr. Citro’s **SONY PDA** arrived from Consumer Depot, it was not as advertised; it was nonfunctional and had a gash on the screen making it look like it had been abused. *Id.* ¶ 6.

242. In addition, the power supply and wires which arrived with the **SONY PDA** were not compatible with the unit and could not be used. *Id.* ¶ 6.

243. In sum, the **SONY PDA** Mr. Citro received from Consumer Depot “was totally useless and did not work.” *Id.*

244. On June 21, 2004, Mr. Citro spent an additional \$17.85 to return the nonfunctional **SONY PDA** to Consumer Depot. *Id.* ¶ 7.

245. Consumer Depot eventually refunded Mr. Citro the original \$36.00 he paid for the **SONY PDA**, but refused to refund the original shipping charge of \$12.00 or the \$17.85 Mr. Citro spent to send the **SONY PDA** back to Consumer Depot. *Id.* ¶ 8.

246. Mr. Citro felt he paid for a product but got used junk in return. *Id.* ¶ 9.

3. Consumer Manuel Weiss

247. On October 24, 2002, consumer Manuel Weiss purchased a **Palm i705 PDA** (personal digital assistant) from Consumer Depot's website at www.consumerdepot.com. Weiss Aff., ¶ 1 and Exhibits 1 - 3 thereto, **A155 - A160**.

248. Consumer Depot advertised and sold Mr. Weiss' **Palm i705 PDA** as "**Consumer Depot Refurbished**" and "**Open Box.**" *Id.*

249. Mr. Weiss saw that on its website, Consumer Depot stated that "**Consumer Depot Refurbished**" meant:

Consumer Depot Refurbished "Depot Refurbished" products are in complete working order and thoroughly tested by competent technicians. Products have a limited vendor warranty, if any, or carry a Consumer Depot warranty.

Weiss Aff., ¶ 1 and Exhibit 3 thereto (underscored emphasis added), **A155 - A160**.

250. Mr. Weiss could not find any definition for the term "Open Box." *Id.* ¶ 1.

251. Mr. Weiss paid a total of 245.81 for the **Palm i705 PDA**. *Id.*

252. When Mr. Weiss' **Palm i705 PDA** arrived a few days later, it did not work; it would not turn on and would not charge. *Id.* ¶ 2.

253. When Mr. Weiss contacted Consumer Depot by telephone, Consumer Depot told him it would not replace his **Palm i705 PDA** unless he paid Consumer Depot an additional Fifty Dollars (\$50.00). *Id.* ¶ 3 (emphasis added).

254. Mr. Weiss refused this option and requested a refund, but Consumer Depot refused to give him a refund. *Id.* ¶ 4.

255. Consumer Depot advised Mr. Weiss that after he had purchased the **Palm i705 PDA**, Consumer Depot had sent him an email with an "order confirmation" which stated that Consumer Depot never gave refunds under any circumstances. *Id.* ¶ 4.

256. Mr. Weiss had no record of ever receiving such an "order confirmation" from Consumer Depot. *Id.*

257. Mr. Weiss then returned to check Consumer Depot's website and he was not able to find any information on its website explaining that the result of Consumer Depot delivery of a product which did not work as advertised, a customer would lose their money. *Id.* ¶ 5.

258. The only option Consumer Depot gave Mr. Weiss was a "store credit" of \$245.81.

Id. ¶ 5 (emphasis added).

259. Mr. Weiss only received the store credit after he shipped the nonfunctional PDA back to Consumer Depot at his expense. *Id.* ¶ 5.

260. Mr. Weiss eventually visited Consumer Depot's retail location and selected enough items to equal his store credit, but when he tried to pay for them, Consumer Depot told him that since he had made his original purchase on its website, he had to have the items shipped to him via Federal Express at his expense. *Id.* ¶ 6.

261. Mr. Weiss again checked Consumer Depot's website, but was not able to locate any of these additional policies on Consumer Depot's website and was not told about such policies prior to the time of his purchase. *Id.* (emphasis added).

4. BBB Complaints

262. Numerous additional examples of Fike and Consumer Depot's sales of visibly defective or damaged merchandise can be found in the attached records of the Greater Nashville Better Business Bureau, as set forth below: 520 and 536.

"Bait and Switch! ... '[I]nspected by our highly trained technicians to insure [sic] that it is fully functional.' ... Received a destroyed unit[,] tape was holding unit together[,] screen was cracked...."

Consumer Ramon Duren

"False advertising 'Inspected by our technicians to insure QUALITY' No way this was checked for any type of quality."

Consumer Eric Howell
BBB Complaint, Sept. 16, 2004 Ex. 333

"Upon arrival, the box and phone were both labeled 'non working unit'[T]he ad ... states that the phone is inspected and ready to work "

Consumer Carole Perko
BBB Complaint, Oct. 26, 2003 Ex. 430

"Damaged Product Company ad stated the product had been inspected by their [h]ighly trained technicians"

Consumer James Perry
BBB Complaint, Aug. 16, 2003 Ex. 432

"The phone was described as tested and operational, but turned out to be dead on arrival"

Consumer Max Solonski
BBB Complaint, March 26, 2003 Ex. 487

"The seller sold a known (because it was inspected by their highly trained technicians) faulty router. I am an A+ Certified technician."

Consumer Harold Wiegman
BBB Complaint, Dec. 12, 2003 Ex. 520

263. During deposition testimony, defendant Fike admitted that when Consumer Depot advertises that an item, such as a PDA, is "inspected by our technician to ensure that it is functional," all that means is that employees who may have no special training, do nothing more than simply turn an item on. *See* Deposition of Martin Fike, pp. 159 - 160, **A741**.

G. Examples of Misrepresentations Regarding Defective Merchandise

264. Consumers have also complained that Consumer Depot sells visibly defective merchandise as new or functional. *See, e.g.*, Hubbell (BBB) Aff., ¶ 14, **A194**, Martin Aff, **A85 - A87**, Streiff Aff., **A622- A627**, McDermott Aff., **A89**, Schuler Aff., **A128**, Weissman Aff., **A162** and BBB Complaint Records **A215, A269, A284, A288, A295, A333** and **A335**.

265. Consumers have even reported receiving allegedly new or functional merchandise from Consumer Depot which was prominently labeled with a "DEFECTIVE" or "RETURN" sticker. *See* Martin Aff, **A85 - A87** and Streiff Aff., ¶ 6, **A623**.

266. Consumer Depot has even shipped merchandise that was soaking wet or covered in mold, while representing such items were brand new and functional. *See* Affidavit of Marvin McDermott, ¶ 1, **A88 - A95**.

1. Consumer Steven Streiff

267. On January 31, 2004, Mr. Streiff visited the eBay's internet site and saw that Consumer Depot, through its "surplusdealz05" eBay user id, was offering two **Lexmark 140109A Toner Cartridge -HP C3909** items (hereinafter "**Lexmark 140109A Toner Cartridges**") for auction as item numbers 3456489114 and 3456608476. *See* Affidavit of Steven Streiff, ¶ 1 and Exhibit A thereto, **A622 - A627**.

268. Consumer Depot's eBay auction description for the **Lexmark 140109A Toner Cartridges** stated the following:

Let our LOSS be your GAIN!! We receive truckloads of LIQUIDATION inventory each month. Due to the sheer volume of product we do not have enough time to test for functionality or completeness so these items are being sold as UNTESTED. These are customer returns in the original manufacturers retail boxes. However some of these items may not work or are damaged. - If you are looking for a bargain these items can SAVE you MONEY! sold as is). LEXMARK HP LaserJet 5Si/5Si NX/5 Si Mopier Black Toner Cartridge

Id., Exhibit A at p. 2, **A626** (emphasis added).

269. In addition, Consumer Depot published photographs of the LEXMARK Cartridges. *Id.*

270. Based on Consumer Depot's advertising, Mr. Streiff believed that the **Lexmark 140109A Toner Cartridges** were in good condition and were functional, because they were represented as a "bargain," and as items that would save money. Streiff Aff. ¶ 4, **A623**.

271. On January 31, 2004, Mr. Streiff submitted the winning bids for the two Consumer Depot **Lexmark 140109A Toner Cartridges-HP C3909**, item numbers 3456489114 and 3456608476. *Id.* ¶ 5.

272. Mr. Streiff spent a total of \$28.02 with Consumer Depot for the cartridges: \$.01 for each cartridge and another \$14.00 to ship each cartridge. *Id.*

273. When Mr. Streiff's **Lexmark 140109A Toner Cartridges** arrived from Consumer Depot, both were defective. *Id.* ¶ 6.

274. *Both cartridges arrived with a label attached to them which clearly stated "DEFECTIVE."* *Id.*

275. Both **Lexmark 140109A Toner Cartridges** were completely useless to Mr. Streiff. *Id.*

276. Mr. Streiff could not believe that Consumer Depot would knowingly send clearly labeled "**DEFECTIVE**" merchandise to a customer. *See* Streiff Aff. ¶ 7, **A623 - A624**.

277. As Mr. Streiff pointed out in his Affidavit:

Everyone at Consumer Depot who handled these particular LEXMARK Cartridges would have easily seen the "DEFECTIVE" labeling, and

would have known these items were DEFECTIVE and useless.

Id.

278. Mr. Streiff also noted that none of the photographs of the **Lexmark 140109A Toner Cartridges** showed *the prominent "DEFECTIVE" labels on them. Id.*

279. Consumer Depot refused to give Mr. Streiff a refund for the \$28.02 he spent for the **Lexmark 140109A Toner Cartridges**, even after they were contacted by the Tennessee Division of Consumer Affairs. *Id.* ¶ 8.

280. Mr. Streiff felt Consumer Depot knew or should have known that the two **Lexmark 140109A Toner Cartridges** to him were defective and unusable. *Id.* ¶ 9.

281. Mr. Streiff felt Consumer Depot should have clearly disclosed the fact the cartridges were defective before selling these cartridges to unsuspecting consumers on eBay. *Id.*

282. Mr. Streiff felt he had been deceived and misled by Consumer Depot. *Id.*

2. Consumer Justin Kennedy

283. On August 29, 2005, consumer Justin Kennedy visited the eBay's internet site and saw that Consumer Depot, through its "**bargaindepot04**" eBay user id, was selling a **Nintendo Gamecube Video Game Platinum System *NIB*** through auction as item number 8214939181. *See* Affidavit of Justin Kennedy, ¶ 1, A591 - A6592.

284. Consumer Depot's eBay auction description for the **Nintendo Gamecube** stated that it was "new in box" ("*NIB*"), which led Mr. Kennedy to believe he would receive a new Nintendo Gamecube that would be in good shape and fully functional. *Id.* ¶ 2.

285. On August 29, 2005, Mr. Kennedy submitted the winning bid for the **Nintendo Gamecube** for a total of \$78.00: \$56.00 for the winning bid and \$22.00 for shipping. *Id.* ¶ 3.

286. When Mr. Kennedy's Nintendo Gamecube arrived from Consumer Depot, it was visibly broken: a joystick was broken and the game was scratched. *Id.* ¶ 4.

287. It was obvious to the naked eye that the joystick was broken and the game was badly scratched. *Id.*

288. Mr. Kennedy immediately tried contacting Consumer depot by email, but could not get a response. *Id.* ¶ 5.

289. Mr. Kennedy eventually received a response from Consumer Depot which claimed it had not received any of its earlier emails. *Id.*

290. When Mr. Kennedy offered to send Consumer Depot copies of his earlier emails to Consumer Depot, he heard nothing further from Consumer Depot. *Id.*

291. Mr. Kennedy filed disputes with eBay and with the Division of Consumer Affairs, but Consumer Depot continued to refuse to refund his money. *Id.* ¶ 8.

292. Mr. Kennedy eventually left negative feedback against Consumer Depot on eBay and Consumer Depot promptly retaliated and left negative feedback against Mr. Kennedy on eBay. *Id.*

293. Mr. Kennedy would have never spent \$78.00 for a Nintendo Gamecube that was broken and scratched. *Id.*

3. Consumer Chris Martin

294. On July 22, 2005, consumer Chris Martin visited Consumer Depot's website at www.consumerdepot.com, and decided to buy some Maxell headphones. *See* Affidavit of Consumer Chris Martin, ¶ 1, A85 - A87.

295. Consumer Depot's website advertisement stated that the Item Condition was **"New/Open Box: Complete, in Original Packaging with All Accessories,"** and that the headphones came with a **fourteen-day warranty.** *Id.*

296. Mr. Martin decided to go ahead and buy three sets of Maxell headphones from Consumer Depot. *Id.* ¶ 2.

297. When Mr. Martin received his headphones, however, they were not **"New/Open Box,"** but were all visibly defective. *Id.* ¶ 3.

298. More particularly, each box for each headphone was clearly labeled **"RETURN,"** and each box had the exact defect written out and described on the **"RETURN"** label. *Id.* ¶ 3.

299. The next day Mr. Martin attempted to contact Consumer Depot via e-mail to express his dissatisfaction, but Consumer Depot responded with an automated message stating it would refund the original purchase price and shipping charges for defective items, but that he had to get an "RMA" (return merchandise authorization). *Id.* ¶ 4.

300. When Mr. Martin went to get an RMA, Consumer Depot's RMA form said that he would get a store credit only, and that Consumer Depot would *not* refund his original shipping charges. *Id.* ¶ 5.

301. Mr. Martin again attempted to e-mail Consumer Depot, but Consumer Depot again responded with another non-responsive, automated e-mail. *Id.* ¶ 6.

302. Mr. Martin never received a refund from Consumer Depot. *Id.* ¶ 7.

4. Consumer Marvin McDermott

303. On November 18, 2005, consumer Marvin McDermott won defendants' eBay auction for a DVD of the movie "Ghost Ship." *See* Affidavit of Marvin McDermott, ¶ 1, A88 - A95.

304. **Figure 14**, below is an excerpt from Consumer Depot's eBay description for Mr. McDermott's purchase and contains terms such as "**Brand New**" and "***SEALED***." *Id.* ¶¶ 2-6 and Ex. A thereto, A88 - A95.

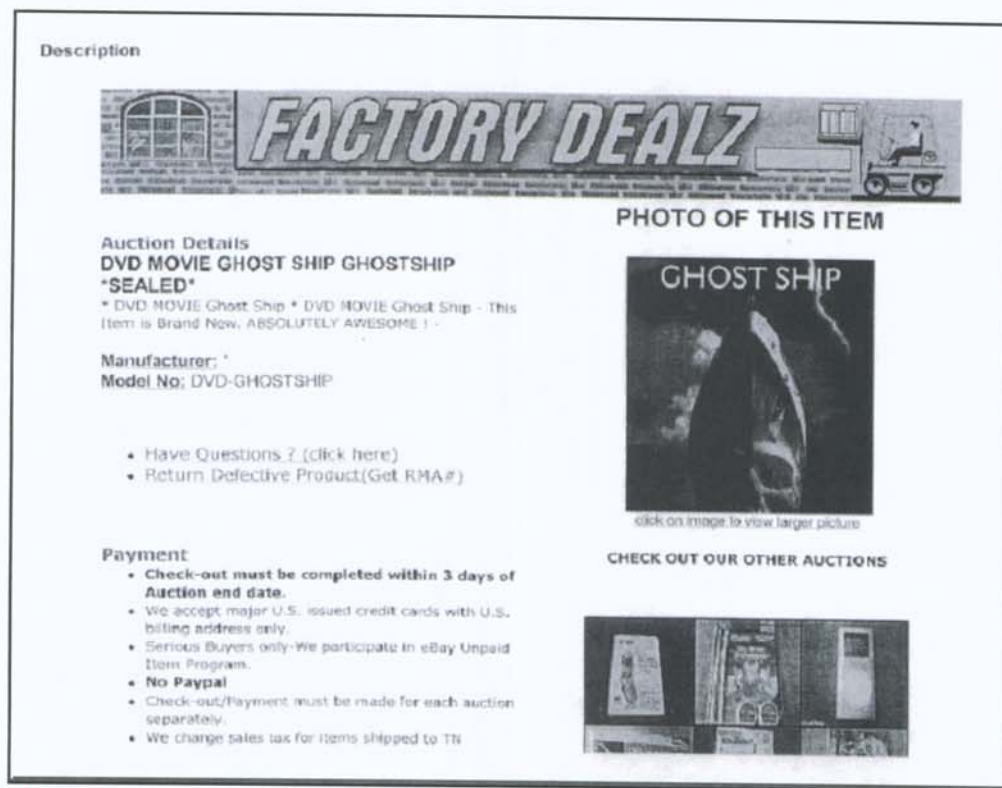


Figure 14

305. When Mr. McDermott received his DVD from Consumer Depot, it was wet and moldy. *Id.* ¶¶ 2-6 and Ex. A thereto.

306. There was even visible mold growing on the outside of the DVD case. *Id.* ¶ 6.

307. Mr. McDermott tried to contact Consumer Depot by telephone and through the internet, but could not get any meaningful response. *Id.* ¶ 7.

308. Eventually Mr. McDermott reached Consumer Depot, but Consumer Depot told him there was nothing it could do. *Id.*

309. Mr. McDermott went to the eBay auction site and saw that there were many other consumers who had complained of wet and moldy products from Consumer Depot. *Id.* ¶ 8.

310. Mr. McDermott also observed that every time a consumer posted negative feedback against Consumer Depot on eBay, Consumer Depot promptly retaliated and posted negative feedback against the consumer. *Id.*

312. Fearing such retaliation, Mr. McDermott simply posted “neutral” feedback against Consumer Depot. *Id.*

313. Consumer Depot never responded to Mr. McDermott’s requests for help and never gave him a refund. *Id.* ¶ 9.

5. Consumer John Machata

314. On September 5, 2005, consumer John Machata won defendants’ eBay auction for two Panasonic cordless telephones. *See Machata Aff.*, ¶¶ 1-5, A77 - A84.

315. Consumer Depot’s eBay advertisement led Mr. Machata to believe that the telephones it was selling were sound pieces of equipment, fully functional, a good deal and returnable. *Id.* at ¶¶ 2-4. *See also* Ex. 1 thereto (copies of Consumer Depot’s auction pages for this item from the eBay website).

316. When Mr. Machata received the telephones, however, they were both broken and covered in dirt. *Machata Aff.*, ¶ 6.

317. One phone could not be charged at all, and the other phone would not work even after being charged for the requisite eighteen hours. *Machata Aff.*, ¶ 6.

318. Mr. Machata returned the items within Consumer Depot’s seven day return period using Priority Mail, but Consumer Depot refused to give him a refund and even kept his telephones. *Id.* at ¶¶ 7-12.

319. Mr. Machata posted negative feedback about Consumer Depot on eBay, and Consumer Depot promptly retaliated by posting negative feedback about Mr. McDermott on eBay. *Id.* at ¶ 10.

6. Consumer Chris Meyers

320. In mid-April 2005, consumer Chris Myers won defendants’ eBay auction for a **Sirius Boombox**. *See Myers Aff.*, ¶¶ 1-3, A118 - A123.

321. Consumer Depot’s eBay advertisement led Mr. Myers to believe that the **Sirius Boombox** was new and would be a good deal. *Id.* ¶ 2.

322. When Mr. Myers received the **Sirius Boombox** from Consumer Depot, the antenna was broken and the wrong power cord had been provided. *Id.* ¶ 4.

323. Mr. Myers tried to run the **Sirius Boombox** on batteries only, but the boombox still did not work. *Id.*

324. Mr. Myers tried to contact Consumer Depot, but no one ever responded. *Id.* ¶ 5.

325. Mr. Myers then saw that Consumer Depot's eBay return policy stated it would not refund shipping charges, and he did not want to spend his own money returning a defective item that he felt had been fraudulently sold to him in the first place. *Id.* ¶ 6.

326. Mr. Myers was also concerned that if he returned the item, Consumer Depot would just turn around and sell it to another unsuspecting victim. *Id.*

7. Consumer Gevon Ware

327. On May 28, 2005, consumer Gevon Ware visited Consumer Depot's retail store in Nashville and saw a 17" MGA Flat Panel Monitor for sale that was plugged in and "on." See Ware Aff. at ¶¶ 1-2, A150 - A154.

328. At that time, Ms. Ware noticed there was a tiny chip in the upper portion of the monitor which did not effect the picture and that the Monitor appeared sound. *Id.* ¶¶ 1-2.

328. Ms. Ware asked a Consumer Depot salesman about the Monitor, and he assured her it was fine and had no problems. *Id.*

329. Ms. Ware also saw a number of new, boxed printers for sale, including a Hewlett-Packard PSC 2410 All-in-One Photosmart Printer for sale for \$99.99. *Id.* ¶ 3.

330. She decided to buy both the Monitor and the Printer. *Id.* ¶¶ 2-3.

331. When Ms. Ware got home and turned her Monitor on, it projected a bright pink line down the left side of the monitor, and the tiny chip in the center of the screen was now very bright, because her computer wallpaper was blue. *Id.* ¶ 4.

332. She immediately returned the Monitor to the store, but the Consumer Depot salesman refused to give her a refund. *Id.* ¶ 6.

333. Her salesman called over another salesman who stated that the pink line was visible at the time she bought the Monitor. *Id.*

334. Ms. Ware disagreed, and then the salesman admitted that the bright pink line "comes and goes" depending how long the Monitor has been on. *Id.*

335. Ms. Ware then asked to speak with a manager and a man named “Rust” came over, but still refused to give her a refund. *Id.*

336. All three men spoke to her in a condescending way, and she felt belittled and humiliated. *Id.*

337. Intending to stop payment on her check, Ms. Ware left the store without the Monitor and without a refund. *Id.* ¶ 7.

338. When Ms. Ware got home, she unpacked her printer, but when she looked at her receipt, she saw the Consumer Depot had charged her separately for the black and color ink cartridges that were supposed to be included with her printer, at \$19.99 each. *Id.* ¶ 8.

339. Ms. Ware immediately went back to Consumer Depot to complain. *Id.* ¶ 9.

340. The manager, “Rust,” explained that since Consumer Depot bought discontinued merchandise from stores like Office Max, they were supposed to take the items out of the box and sell them at a “wholesale price.” *Id.*

341. “Rust” also assured Ms. Ware that her Printer was new, but would not give a refund for the cartridges. *Id.*

342. When Ms. Ware got home, she called Hewlett-Packard and was advised the cartridges should not have been sold separately and that her printer had been registered to someone else, which reduced her warranty. *Id.* ¶ 10.

343. The printer worked initially, then stopped. *Id.*

344. Ms. Ware continued to call Consumer Depot to resolve her complaints, but the staff was extremely rude to her and began to ignore her calls and messages. *Id.* ¶ 11.

345. Ms. Ware stopped payment on her checks. *Id.*

346. Later, when a store refused to accept her check, she learned that Consumer Depot had reported her to Telecheck. *Id.* ¶ 13.

347. She gave her Consumer Depot paperwork to Telecheck and they removed the derogatory report against her from their database. *Id.* ¶ 11.

348. In her Affidavit, Ms. Ware states she feels she has been “misled, deceived, humiliated and embarrassed by Consumer Depot” and still gets “very upset when I think of what I went through with Consumer Depot.” *Id.* ¶ 14.

8. Consumer Marvin Weissman

349. On June 7, 2004, consumer Marvin Weissman won defendants' eBay auction for a Casio FX-7400G Plus Graphing Calculator. *See* Weissman Aff., ¶¶ 1-5, A161 - A167.

350. Consumer Depot's eBay advertisement stated the Calculator "**came in on a huge liquidation from a MAJOR RETAILER,**" had been "*Inspected by our technicians to insure [sic] TOP QUALITY*" and "**This item is the one you want if you are looking to SAVE BIG!!**" *Id.* at ¶¶ 2-3. (emphasis in original). *And see* Ex. A thereto (Copy of Consumer Depot's actual auction pages for this item from the eBay website). *Id.*

351. Consumer Depot also displayed a photograph of the Calculator, which depicted it as new, in its original retail package. *Id.* ¶¶ 2-3 *and see* Ex. A thereto.

352. Based on these representations and the photograph, Mr. Weissman believed that the Calculator was a brand new, inspected and fully functional product, and that he would indeed "SAVE BIG!!" by buying it. *Id.* at ¶ 4.

353. When Mr. Weissman received his Calculator, however, it had a tag attached to it which said "**defective**" and did not work. *Id.* at ¶ 6.

354. When Mr. Weissman tried to communicate with Consumer Depot, it would not respond to his emails, but later wanted him to pay shipping. *Id.* ¶ 7.

355. To date, Consumer Depot refused to provide Mr. Weissman with a refund. *Id.* ¶ 8.

9. BBB Complaints

356. Records from the BBB contain numerous additional examples of consumer purchases that involved products advertised as functional or new, but which were visibly defective:

"[D]escribed as display model ... looked like it had been run over by a car" A215

*"[D]escribed as 'great, top quality & ready to use.'
I received a dirty, cracked, nonworking PDA" A269*

"[L]ooked like it was run over by a truck" A284

"SELLS EMPTY SOFTWARE BOXES as actual software." A288

"No where in the listing is there any mention of selling used or empty ink Cartridges" A295

"'LIKE NEW Condition ...' Product was written on, headphones were taped together..." A333

"[T]he Best Buy pink return sticker was still on them." A335

"I received a used, empty cartridge - trash." A399

"The hardrive...had an arrow drawn with a black marker indicating the damaged [sic] area." A414

"Upon arrival, the box and phone were both labeled 'non working unit.'" A430

"Product ... had diagonal [sic] crack in face of PDA" A432

"[I]tem was clearly abused as evidenced by the multiple scratches and chew marks" A439

"The iPod was described as new. When I received it, it was very scratched up, the cords were broken, it was very dirty and it does not work. I paid over \$200 for this item." A441

"But when the phone arrived ...it looked like a complete useless piece of trash ..." A477

"[Y]ou could clearly see that a ...250gb drive [label] was placed on a 20 gb drive." A485

"Although the phone was listed as a display unit, showing a complete picture of the phone, all they sent me was the base portion of the phone, no handset, no battery, no charger" A480

"The cover will not close completely therefore it will not fax...." A489

"[T]he box was smashed and the CD was full of scratches and OPENED." A508

H. Examples of Misrepresentations Regarding Appearance or Visible Condition

357. A high number of consumer complaints concern Consumer Depot's practice of selling ink cartridges which look new and intact in the advertising, but turn out to be empty. *See Baldwin Aff.*, ¶ 6(h), A27. *See also Schuler Aff.*, ¶¶ 1-5, A127 - A134.

358. Some consumers pay high dollars believing they are getting a deal on ink or toner, only to receive broken, dirty and/or empty cartridges which have a nominal value at best. *Id.*

359. Consumer Depot routinely advertises that merchandise is in good cosmetic shape or otherwise "looks good." *See, e.g.*, A125, A215 and A312.

1. Consumer Ralph Schuler

360. On October 19, 2004, consumer Ralph Schuler won defendants' eBay auction

for two lots of **Lexmark Ink Cartridges**. *See* Schuler Aff., ¶¶ 1-4, A127 - A128.

361. Consumer Depot's eBay advertisement displayed a **Lexmark Ink Cartridge** in an unopened box, along with a new looking ink cartridge right next to it. *Id.* at ¶ 2. *See also* Ex. A thereto. A127 - A134.

362. Consumer Depot's written description of the **Lexmark Ink Cartridge** stated it was "**GENUINE**," and that "**Someone is going to get a DEAL!!**" *Id.*

363. Mr. Schuler paid a total of \$71.00 for the ink cartridges. *Id.* ¶ 4.

364. When Mr. Schuler received his package from Consumer Depot, however, he was shocked to find that only used and empty ink cartridges had been thrown in loose in a Federal Express box, without any protective packaging and without their boxes. *Id.* ¶ 5.

365. In his Affidavit, Mr. Schuler states he feels that Consumer Depot's advertising was false and misleading, and that he had been completely defrauded by Consumer Depot. *Id.* ¶ 8.

366. Mr. Schuler states that he would have never spent \$71.00 for empty ink cartridges, and Consumer Depot should have advertised the cartridges as "used and refillable," or "used and empty," but not as "GENUINE" ink cartridges along with a photograph of an ink cartridge in a new, unopened box. *Id.* at ¶¶ 6-8.

367. Mr. Schuler feels that he paid \$71.00 for something that might have been worth \$5.00 at most. *Id.* at ¶ 6.

368. Mr. Schuler tried to communicate with Consumer Depot about the problem, but first Consumer Depot responded with automated, non-responsive e-mails, and then would not respond to him at all. *Id.* at ¶ 7.

369. Mr. Schuler posted negative feedback about Consumer Depot on eBay. Consumer Depot promptly retaliated and posted negative feedback about him on eBay. *Id.* at ¶ 7.

2. Consumer Dhamija Pradeep

370. On January 2, 2004, consumer Dhamija Pradeep won defendants' eBay auction for a Canon Black Toner Cartridge. Pradeep Aff., ¶¶ 1-5 and Exhibit A thereto, A124 - 126.

371. Before Mr. Pradeep bid on this cartridge, he e-mailed Consumer Depot to find out more about it, and told Consumer Depot he did not want to end up with an empty cartridge. *Id.* ¶ 2.

372. Consumer Depot responded with generic non-responsive e-mails, which shed

no light on the auction nor answered his questions. *Id.*

373. Because Consumer Depot's written description of the Canon toner cartridge said **"These are customer returns but are in the original manufacturer's retail boxes and look good. The condition of these items ranges from NEW to Open Box Returns,"** Mr. Pradeep decided to go ahead and bid on them. *Id.* ¶ 4.

374. In his Affidavit, Mr. Pradeep states:

[W]hile I understood that there was a possibility that the toner cartridge might not work or be damaged, I still thought it would have value for me if it was full of toner, since I could possibly extract the toner or fix the cartridge. **I had no reason to believe that the toner cartridge would be empty, and Consumer Depot stated nothing to this effect in its eBay description or in its response to my e-mail.**

Id. (emphasis in original).

375. When Mr. Pradeep received his toner cartridge from Consumer Depot, it was completely empty and had obviously been used. *Id.* ¶ 6.

376. In his Affidavit, Mr. Pradeep notes that an empty toner cartridge weighs approximately ½ lb. less than a full cartridge. *Id.* at ¶ 7.

377. Mr. Pradeep points out that even if Consumer Depot did not look at the cartridge before shipping it (which he says is not the case because the advertisement said it **"looks good,"**) the difference in weight would have easily told Consumer Depot that it was empty, and anyone who handled this cartridge would have known it was empty and used. *Id.* ¶ 7.

378. Mr. Pradeep tried to get a credit from Consumer Depot, but Consumer Depot refused. *Id.* ¶ 8.

379. Mr. Pradeep wrote approximately eight or nine e-mails to Consumer Depot trying to resolve this problem, but Consumer Depot refused all attempts at amicable resolution. *Id.* ¶ 8.

380. Mr. Pradeep posted negative feedback about Consumer Depot on eBay and Consumer Depot promptly posted negative feedback about Mr. Pradeep on eBay. *Id.* ¶ 9.

3. BBB Complaints

381. Representative examples of consumer complaints regarding this issue

include the following:

"No where in the listing is there any mention of selling used or empty ink cartridges"

Consumer Benjamin Eliaz
BBB Complaint, Feb. 12, 2004, **A295**

"I received a used empty cartridge - trash."

Consumer Marc McCulloch
BBB Complaint, Feb. 19, 2004, **A399**

F. Examples of Misrepresentations Stating That Items "Work Great"

382. Fike and Consumer Depot frequently pass off broken and dirty merchandise as functional, and refuse to remedy such problem in response to consumer complaints. Machata Aff., ¶¶ 2-12, **A77 - A84**, Lock Aff., ¶¶ 1-7, **A69 - A76** and Myers Aff., ¶¶ 1-9, **A118 - A123**.

1. Consumer Mitch Krinsky

383. On January 14, 2006, consumer Mitch Krinsky visited the eBay internet site and saw that Consumer Depot, through its "**bargaindepot04**" eBay user id, was selling an **ATT Two-Line Corded Home Phone 972 Speakerphone** through auction, as item number 5853281769. *See* Affidavit of Mitch Krinsky, ¶ 1 and Exhibit A thereto, **A593 - A602**.

384. Consumer Depot's eBay auction description for ATT Speakerphone stated the following:

Auction Details

ATT TWO-LINE CORDED HOME PHONE 972 SPEAKERPHONE *LOOK*

- This item works great and is in it's [sic] original box. The photo above is the item you are bidding on.

- [Have questions? Click here!](#)
- [Return defective product \(Get RMA#\)](#)

Id. ¶ 2 and Exhibit A at p. 2, **A593** and **A598**.

385. Consumer Depot's advertisement for the **ATT Speakerphone** specifically stated that it "**works great**," was still in its "**original box**" and that the item in the photograph was the same item that Mr. Krinsky was bidding on. *Id.* ¶ 2 and *see* Exhibit A at p. 2, **A594** and **A598**.

386. In addition to the above description, Consumer Depot also posted at least three photographs of the **ATT Speakerphone** on the same auction page, all of which depicted an ATT speakerphone with a handset. *Id.* and see Exhibit A at pp. 2, 3 and 5, **A594** and **A598 - A599** and **A601**.

387. Consumer Depot's above description and photographs led Mr. Krinsky to believe that he would receive the **ATT Speakerphone** exactly as depicted and described. *Id.* ¶ 4.

388. On January 14, 2006, Mr. Krinsky submitted the winning bid for Consumer Depot's above **ATT Speakerphone** and paid Consumer Depot a total of \$ 14.99: \$.99 for the winning bid and \$ 14.00 for shipping. *Id.* ¶ 5.

389. When Mr. Krinsky's **ATT Speakerphone** arrived from Consumer Depot it was not as described and was missing its handset. *Id.* ¶ 6.

390. Mr. Krinsky immediately tried contacting Consumer Depot by e-mail, but could not get a response. *Id.* ¶ 7.

391. Mr. Krinsky also tried calling Consumer Depot by telephone and eventually went back to the auction page and clicked on the return link. *Id.*

392. Consumer Depot provided a very narrow window of time for returns and in order to make a timely return, he would have to spend another \$20.00 to ship the **ATT Speakerphone** by Federal Express. *Id.*

393. Mr. Krinsky was not willing to spend \$20.00 to get a \$.99 refund, so he did not pursue a return with Consumer Depot. *Id.* ¶ 8.

394. Mr. Krinsky left negative feedback about Consumer Depot on eBay and Consumer Depot promptly retaliated and left negative feedback against Mr. Krinsky. *Id.*

395. Mr. Krinsky would never have purchased the **ATT Speakerphone** if he had known it would arrive without a handset and that Consumer Depot's return procedure would be so difficult and costly. *Id.* ¶ 9.

396. Consumer Depot also leads consumers to believe its items work or are functional by advertising them as "**store display models**," Citro Aff., ¶ 2 and p.2 of Ex. A thereto, **A45 - A50**, "**FUNCTIONAL**," *id.*, "**inspected by technicians**," *id.* and "**work[s] great**," Lock Aff., ¶ 2 and p. 2 of Ex. A thereto, **A69 - A76**, still in the "**original box**," *id.* and "**Refurbished**," Weiss Aff., ¶¶ 1-2, **A155 - A160**.

2. Consumer Brian Lock

397. On July 8, 2004, consumer Brian Lock won defendants' eBay auction for Altec

Lansing headphones. *See* Lock Aff., ¶¶ 1-4, A69 - A76.

398. Consumer Depot's eBay advertisement stated that the item "**works great**" and was still "**in its original box**" and **returnable within 7 days**. *Id.* at ¶ 2. *See also* p. 2 of Ex. A thereto (Copy of Consumer Depot's actual advertisement for this item from eBay's website.)

399. Consumer Depot's auction photograph displayed the headphones in their original box. *Id.* at ¶ 2. *See also* p. 2 of Ex. A thereto (Copy of Consumer Depot's actual advertisement for this item from eBay's website.)

400. When Mr. Lock received the headphones, they were "dead" and did not work. *Id.* ¶ 5.

401. Mr. Lock tried to communicate with Consumer Depot, but it did not respond to his e-mails. *Id.* ¶ 6.

402. Mr. Lock posted negative feedback about Consumer Depot on eBay, and Consumer Depot promptly retaliated and posted negative feedback about him on eBay. *Id.* ¶ 5.

3. BBB Complaints

403. The following are representatives examples of consumer complaints about Consumer Depot's misrepresentations that items work great:

"[Advertised] This item works great and is in its original box When I opened the item the two most valuable parts were missing." A491

"How can it 'works great' when $\frac{1}{2}$ the parts are missing?" A388

J. Examples of Misrepresentations That Items Are Complete

404. Fike and Consumer Depot misrepresent that some merchandise includes certain contents or hardware. Defendants often display photographs or post descriptions of merchandise which includes such hardware, but ship incomplete products. *See, e.g.*, A67 - A68, A225 - A226, A229, A243 - A248, A253 - A263, A271, A288, A354, A397 - A398, A464, A477, A480, A491 - A495, A504 and A507.

1. Consumer Mitch Krinsky

405. On January 14, 2006, consumer Mitch Krinsky visited the eBay internet site and saw that Consumer Depot, through its “**bargaindepot04**” eBay user id, was selling an **ATT Two-Line Corded Home Phone 972 Speakerphone** through auction, as item number 5853281769. *See* Affidavit of Mitch Krinsky, ¶ 1 and Exhibit A thereto, **A593 - A602**.

406. Consumer Depot’s eBay auction description for **ATT Speakerphone** stated the following:

Auction Details

ATT TWO-LINE CORDED HOME PHONE 972 SPEAKERPHONE *LOOK*

- This item works great and is in it's [sic] original box. The photo above is the item you are bidding on.

- [Have questions? Click here!](#)
- [Return defective product \(Get RMA#\)](#)

Id. ¶ 2 and Exhibit A at p. 2, **A593** and **A598**.

407. Consumer Depot’s advertisement for the **ATT Speakerphone** specifically stated that it “**works great,**” was still in its “**original box**” and that the item in the photograph was the same item that Mr. Krinsky was bidding on. *Id.* ¶ 2 and *see* Exhibit A at p. 2, **A594** and **A598**.

408. In addition to the above description, Consumer Depot also posted at least three photographs of the **ATT Speakerphone** on the same auction page, all of which depicted an ATT speakerphone with a handset. *Id.* and *see* Exhibit A at **A594, A598 - A599** and **A601**.

409. Consumer Depot’s above description and photographs led Mr. Krinsky to believe that he would receive the **ATT Speakerphone** exactly as depicted and described. *Id.* ¶ 4.

410. On January 14, 2006, Mr. Krinsky submitted the winning bid for Consumer Depot’s above **ATT Speakerphone** and paid Consumer Depot a total of \$ 14.99: \$.99 for the winning bid and \$ 14.00 for shipping. *Id.* ¶ 5.

411. When Mr. Krinsky’s **ATT Speakerphone** arrived from Consumer Depot it was not as described and was missing its handset. *Id.* ¶ 6.

412. Mr. Krinsky immediately tried contacting Consumer Depot by e-mail, but could not get a response. *Id.* ¶ 7.

413. Mr. Krinsky also tried calling Consumer Depot by telephone and eventually went back to the auction page and clicked on the return link. *Id.*

414. Consumer Depot provided a very narrow window of time for returns and in order to make a timely return, he would have to spend another \$20.00 to ship the **ATT Speakerphone** by Federal Express. *Id.*

415. Mr. Krinsky was not willing to spend \$20.00 to get a \$.99 refund, so he did not pursue a return with Consumer Depot. *Id.* ¶ 8.

416. Mr. Krinsky left negative feedback about Consumer Depot on eBay and Consumer Depot promptly retaliated and left negative feedback against Mr. Krinsky. *Id.*

417. Mr. Krinsky would never have purchased the **ATT Speakerphone** if he had known it would arrive without a handset and that Consumer Depot's return procedure would be so difficult and costly. *Id.* ¶ 9.

2. Other Relevant Facts

418. Consumer Veronica LaRock purchased a video game that Consumer Depot advertised had been checked to ensure all game discs were present, but when the game arrived, it was missing discs. *See* LaRock Aff., **A67 - A68**.

419. Consumer Gevon Ware, who bought what she believed was a new Hewlett-Packard printer still in its original box, was required to separately pay for her ink cartridges, even though the box said they were included. *See* Ware Aff., **A150 - A154**.

420. Consumer Teresa Allen visited Consumer Depot's "**bargaindepot04**" eBay auction site and bid on a scanner. *See* Teresa Allen July 15, 2005 BBB Complaint, **A216**.

421. When Ms. Allen's scanner arrived, it was missing its power cords. *Id.*

422. Ms. Allen noted that "the ad for the auction did not say that the cords were NOT included." *Id.*

3. BBB Complaints

433. Records from the BBB contain a number of additional examples of consumer purchases which involved merchandise that did not contain the advertised components or hardware:

"The ad for the auction did not say the cords were NOT included" (Ex. 216)

Consumer Theresa Allen
BBB Complaint July 15, 2005 **A216**

"I received a used and broken CD player that did not include the advertised software disks, manuals and headphones ..."

Consumer Paul Barron
BBB Complaint March 31, 2004 **A225**

"[O]pened item casing and interior components were missing."

Consumer Darsel Barton
BBB Complaint Sept. 16, 2004 A226

*"Sold incomplete used product as
"new, factory sealed."*

Consumer Grant Berry
BBB Complaint Sept. 16, 2004 A229

*"Sold fax machin [sic] with vital,
expensive, missing parts"*

Consumer Laura Burnette
BBB Complaint Feb. 4, 2004 A253

"[O]pened item casing and interior components were missing."

Consumer Darsel Barton
BBB Complaint Sept. 16, 2004 A226

"Sold fax machin [sic] with vital, expensive, missing parts"

Consumer Laura Burnette
BBB Complaint Feb. 4, 2004 A253

434. And additional BBB complaints provide:

Despite the fact that all the parts were said to be included, No accessories were sent with the order despite advertising that said "includes necessary accessories." A243

"1 disc where there should be 3" A254

"It arrived a few day [sic] latter [sic] without the pen, and the powers supply." A263

"It was missing a USB cable. They refused to send me the missing cable." A271

"SELLS EMPTY SOFTWARE BOXES as actual software." A288

"[S]everal items were missing from the box." A355

"How can it 'works great' when $\frac{1}{2}$ the parts are missing?" A388

"DOES THIS MEAN THAT I CAN TURN AROUND AND SELL A CAR WITHOUT AN ENGINE AND SAY, 'What you see in the photo is what is included.'" A397

*"I ordered 4 speakers from them. Only received 2.
They will not ship the other 2 speakers." A464*

"But when the phone arrived at my house, it looked like a complete useless piece of trash literally [sic]. There was no antenna, no plugs, cords, battery" A477

"Although the phone was listed as a display unit, showing a complete picture of the phone, all they sent me was the base portion of the phone, no handset, no battery, no charger, etc." A480

*"[Advertised] This item works great and is in its original box
When I opened the item the two most valuable parts were missing." A491*

*"usb cable and 35 mm slide adapter , film and slide holder were missing ...
Also did not come with software or manual" A504*

K. Misrepresenting Product Warranties

435. Many consumers have complained that Consumer Depot misrepresents warranties and guarantees, A85 - A87, A219, A304 and A324, including manufacturers' warranties. A37-38, A223, A238 and A401.

436. For example, when consumer Chris Martin bought defective headphones which came with a **"fourteen-day warranty,"** Consumer Depot refused to give him a refund. See Martin Aff., A85 - A87.

1. Consumer Harold Bryson

437. On May 24, 2003, consumer Harold Bryson visited Consumer Depot's Powell Avenue retail store in Nashville, after seeing a BBB Telecom IPS Hybrid-Key Telephone System on Consumer Depot's website. Bryson Aff. At ¶ 1.

438. Mr. Bryson understood this system was new, and Consumer Depot's salesman reinforced this understanding. Bryson Aff. At ¶ 1.

439. The system was also described as "New/Open Box" on the receipt. *Id.*

440. Consumer Depot's salesman also stated that the telephone system came with a manufacturer's warranty, in case he had any problems. *Id.*

441. When Mr. Bryson got home and tried out the system, it didn't work. *Id.* ¶ 2.

442. He contacted the manufacturer about the warranty, but the manufacturer explained that because Consumer Depot was not one of their authorized dealers, there was no warranty for his system. *Id.* ¶ 3.

443. Mr. Bryson contacted Consumer Depot, and Consumer Depot advised him it did not give refunds, only exchanges. *Id.* ¶ 4.

2. BBB Complaints

444. The various consumer complaints made to the BBB regarding Consumer Depot's failures to honor its own warranties describe especially troubling facts.

445. For example, consumer Michelle Baham: described the following experience at Consumer depot's store:

"We purchased a Compaq Laptop from Consumer Depot 14 days ago. We spent 1 hr with the Manager emphasizing that we needed a warranty and we were assured that Compaq has a warranty and we had 14 days to return the laptop if any hardware was defective

Almost immediately we began to have problems

When we returned today, Feb 19, 2004 and presenting our receipt and the laptop the same Manager informed us that we have no right to return the product since it is refurbished and Consumer Depot has no responsibility."

See Michelle Baham BBB Complaint, A223.

446. Additional consumer complaints to the BBB can be summarized as follows:

"[W]as told [T.V.] was still under factory warranty One repair shop refused to accept the TV because of the bad practices of the seller [and] a different repair shop ... could not honor the warranty"

Consumer Oliner Bowers, BBB Complaint, Sept. 28, 2005, A238

"7 day warranty should be full refund...cost and shipping and handling in both directions . . . The computer is defective, not NEW!!!!"

"They give you the guarantee on the site that you will be able to get the manufacturer to correct any problems but that is not possible since the company is out of business."

Consumer Lisa McIntyre
BBB Complaint, Jan. 12, 2006, **A401**

"They stated the warranty was 14 days from ordering, but I did not receive the hard drive until seven days after the order was placed."

Consumer Mike Fielding
BBB Complaint, July 18, 2003
A304

"Despite their warranty, they sent me a rusty phone that would not turn on."

Consumer Kevin Allen
BBB Complaint, Oct. 23, 2003
A219

447. Consumer Depot has testified that it thinks that it can use "As Is" as a way to disclaim a number of its responsibilities, including warranties. *See* Response to Request for Admission No. 36, **A821**.

L. Misrepresenting Software Condition

1. Consumer Veronica LaRock

448. On or about March 14, 2005, Consumer Veronica LaRock visited the eBay's internet auction site to buy a **Sims2 Game** for her daughter. *See* Affidavit of Veronica LaRock, ¶ 1, **A603**.

449. At that time, Mrs. LaRock saw that Consumer Depot, through its eBay user id "**swdiscounters**" was offering a **Sims2 Game** for auction. *Id.*

450. Consumer Depot's eBay auction description for the **Sims2 Game** stated that Consumer Depot had checked to make sure all the disks were included in the package. *Id.* ¶ 2.

451. Consumer Depot's above written statement led me to believe that I would receive a complete Sims2 Game from Consumer Depot. *Id.* ¶ 3.

452. Mrs. LaRock submitted the winning bid for the **Sims2 Game** and paid a total of \$27.00 to Consumer Depot, using Consumer Depot's Auction Logistix payment service. *Id.* ¶ 5.

453. When Mrs. LaRock's shipment arrived from Consumer Depot, it was incomplete and was missing Disk 1 from the game. *Id.* ¶ 6.

454. The missing disk rendered the entire game useless, because it could not be loaded onto the computer, nor played without Disk 1. *Id.*

455. Mrs. LaRock attempted to remedy this problem with Consumer Depot by e-mail, but Consumer Depot simply kept sending her the same e-mail, telling her there were no refunds and to re-read the auction details. *Id.* ¶ 7.

456. Mrs. LaRock reread the auction details and confirmed that Consumer Depot specifically represented that it had checked the **Sims2 Game** for all the CDs, which was false. *Id.* ¶ 8.

457. Mrs. LaRock felt she had been defrauded by Consumer Depot. *Id.* ¶ 9.

2. Consumer Albert Monson

458. On May 17, 2005, consumer Albert Monson, Jr. visited Consumer Depot's eBay auction site to purchase a "World of Warcraft" game for his nine year old son. *See* Monson Aff. ¶ 1, A96 - A97.

459. Consumer Depot's eBay advertisement displayed a World of Warcraft game and stated that it came from a "**HUGE Million Dollar software Liquidation.**" *Id.*

460. Mr. Monson understood that since the software came from a store liquidation, it would be new, and submitted the winning bid for the game. Monson Aff. at ¶

461. When Mr. Monson received the software and tried to load it on his computer, he discovered that it was already registered to someone else, and therefore completely unusable. *Id.* at ¶ 6.

3. BBB Complaints

462. Consumers have also made similar software complaints against Consumer Depot at the Better Business Bureau. *See, e.g.,* A412.

463. For example, consumer Anthony Monda reported he had purchased a computer game from Consumer Depot, but when he received it, the CD key was invalid. *Id.*

464. When Mr. Monda contacted the manufacturer of the game, he learned that the game may have been pirated. *Id.*

4. Other Relevant Facts Regarding Consumer Depot's Software Sales

465. According to defendant Fike, software is never returnable, even if a return option is mentioned in an advertisement. *See* Fike Dep. at p. 163-164, **A742**.

Q: [W]hen you knew it was software, why did you even say, 'Not happy, send it back within seven days'?

A: "That's a stock insert that goes with returndealz. So that was not a decision that was made specifically. It's just a statement that all products with a seven-day return can be sent back."

Id. at pp. 164-165, **A742 - 743**.

466. According to defendant Fike, stating that items are brand new is just part of consumer depot's stock language:

Q: "Is it stock to say this item is brand new?"

A: "Yes."

Id. p. 165, **A743**.

467. According to defendant Fike, Consumer Depot's As-Is disclaimers apply even if items were sold not as represented:

Q: "Would your no-return policy apply to items that were sold that weren't as represented?"

A: "There are no returns on software."

Id.

M. Misrepresenting Shipping Cost and Adding Unauthorized Charges

1. Consumer Ernest Stein

468. On May 7, 2006, consumer Ernest Stein visited eBay's internet auction site where he saw that Consumer Depot, through its **"bargaindepot04"** user id, had placed a **CANON IP3000 PIXMA COLOR PHOTO PRINTER *SAVE BIG*** on eBay for auction as item number 6878290477. *See* Affidavit of Ernest Stein, ¶ 1 and Exhibit A thereto, **A614 - A621**.

469. **Figure 15**, above, is an excerpt from the auction details section of the actual auction viewed by Mr. Stein:



Figure 15

See Exhibit A to Stein Aff. at p. 3, A618.

470. In particular, Consumer Depot's eBay auction advertisement for the Canon Color Photo Printer stated:

**CANON IP3000 PIXMA COLOR PHOTO PRINTER
*SAVE BIG***

NO MANUAL; NO POWER ADAPTER; NO PRINTER CABLE -
They say a picture is worth a thousand word? We don't
have time to type that much. Look at this picture !!
Another great auction item. Don't let this one get away.
What you see in the photo is what is included.

Id.

471. In addition, Consumer Depot's auction pages for the **Canon IP3000 Pixma Color Photo Printer** also included at least three photographs of the printer, which depicted the printer in good condition. See Exhibit A to Stein Aff., A616 - A621.

472. Mr. Stein already had one such printer at home, but wanted to buy a second printer for a good price, so the fact that the **Canon IP3000 Pixma Color Photo Printer** did not come with a manual, power adapter or printer cable was not a big deal because he already had these items from his other printer. Stein Aff. ¶ 3, **A614**.

473. Consumer Depot's advertising did not mention or disclose any other problems or defects with Canon Color Photo Printer. *Id. and see* Exhibit A, **A 614** and **A616 - A621**.

474. On May 7, 2006, Mr. Stein submitted the winning bid for the **Canon IP3000 Pixma Color Photo Printer** and spent a total of \$51.06 with Consumer Depot for this item - \$26.06 for the item and \$20.00 for shipping. Stein Aff. ¶ 4, **A614**.

475. Consumer Depot also charged Mr. Stein an additional \$5.00 in "handling," which is not disclosed in its auction advertisement. *Id. and see* Exhibit A, **A616 - A621**.

476. When Mr. Stein's **Canon IP3000 Pixma Color Photo Printer** arrived from Consumer Depot, it was not as advertised and had been cannibalized; parts were missing, including the cartridges and print head cover, rendering the printer useless. Stein Aff. ¶ 5, **A615**.

477. Neither Consumer Depot nor eBay would help Mr. Stein with this problem and he also filed a credit card dispute pending with his credit card company. *Id.* ¶ 6.

478. At the time he wrote his affidavit, Mr. Stein was eighty-three (83) years old, retired and living on a fixed income. *Id.* ¶ 7.

479. Because it would cost Mr. Stein another \$20.00 to ship the item back to Consumer Depot with no guarantee of a refund, Mr. Stein decided not to risk returning the printer and losing more money because it wasn't worth the cost. *Id.*

480. Mr. Stein also left negative feedback against Consumer Depot on eBay and Consumer Depot promptly retaliated and left negative feedback on eBay against him. *Id.* ¶ 8.

481. At the time of his Affidavit, Mr. Stein made over forty-five purchases on eBay, and up until Consumer Depot's retaliatory feedback, had enjoyed a 100% positive feedback rating on eBay. *Id.*

482. Consumer Depot's retaliatory feedback ruined my otherwise 100% perfect, positive eBay rating. *Id.*

483. Mr. Stein felt he had been cheated and misled by Martin Fike and Consumer Depot. *Id.* ¶ 9.

N. Advertising and Implementing Prohibited Contract Terms 113(b)

484. Consumer Depot uses a number of different contract terms and conditions displayed in its eBay auctions, on its web site and in its store, as seen in the various contracts, terms and conditions and eBay auctions which set forth the same in **A1 - A823**.

485. The contract terms and conditions set forth in **A1 - A823** are true and correct terms and conditions used by Consumer depot in commerce.

486. A number of consumers have complained that they were deterred from making returns upon learning that Consumer Depot assesses a so-called 20% or 25% "restocking fee," even though the items they were returning were defective and clearly not suitable for restocking or resale. *See, e.g., A222, A269, A430, A514 and A534.*

487. Defendant Fike testified that he was not sure at what point in the sale transaction Consumer Depot disclosed its restocking fee.

Q: At what point in the eBay transaction is the restocking fee disclosed to the consumers?

A: I'm not certain. It's on some of the auctions. I'm not sure if it's on every one.

See Fike Dep., pp. 200-201, A752.

O. Posting Terms & Conditions Which Deter Returns

488. During his deposition, defendant Fike stated that in most cases, consumers who return defective items get refunds for their shipping costs. *See Fike Dep., p. 161, A742.*

489. Consumer Depot's auction pages do not clarify that restocking fees are not assessed for defective merchandise or due to errors which are caused by Consumer Depot.

1. BBB Complaints

"According to the website, there was a restocking fee to return the product and customer must pay shipping to return it. This would cost me more than I spent on phone originally.

Consumer Carole Perko
BBB Complaint, Oct. 26, 2003 Ex. 430

P. Obstructing & Evading Legitimate Return Attempts

490. Consumers frequently complain that their attempts to remedy problem transactions with consumer Depot prove futile. *See, e.g., A30, A35, A111 - A112, A60 - A61 and A194.*

491. Numerous consumers have complained that Consumer Depot misled them about its return procedures, failed to honor its return policies, refused to issue refunds or credits and otherwise obstructed legitimate return attempts. *See, e.g., A222, A269, A290, A430, A436, A482, A515, A527 and A534.*

492. Many consumers have complained that the defendants' return procedures seem to be designed to deter returns. *See, e.g., A222, A269, A290, A430, A436, A482, A515, A527 and A534.*

493. For example, a number of consumers were deterred from making returns upon learning that Consumer Depot assesses a so-called 20% or 25% "restocking fee," even though the items they were returning were defective and clearly not suitable for restocking or resale. *A222, A269, A430, A514 and A534.*

494. Defendant Fike testified that he was not sure at what point in the sale transaction Consumer Depot disclosed its restocking fee.

Q: At what point in the eBay transaction is the restocking fee disclosed to the consumers?

A: I'm not certain. It's on some of the auctions. I'm not sure if it's on every one.

See Fike Dep., pp. 200-201, A752.

495. Other consumers reported being deterred from making returns because of high shipping costs and Consumer Depot's refusal to pay for return shipping, even where it was at fault. *A405, A430, A436 and A482.*

496. Some consumers attempted to return merchandise in person, but were told to go to the post office to ship it, only to have their shipments later rejected by Consumer Depot. *A269.*

497. In one case, a consumer who lived in Illinois was told to drive to Nashville to resolve a store credit. *A527.*

498. Defendants also insist that consumers obtain so-called "RMA" ("return

merchandise authorization”) numbers when making returns.

499. Some consumers attempted to get RMAs, but reported that Consumer Depot’s website was designed to prevent them from doing so. **A168 - A171, A222 and A236.**

500. One consumer described the RMA process as a never-ending loop. **A228.**

501. For example, consumers Katrina Moultrie and Mary Wilkes received moldy merchandise from Defendants which was advertised as “**BRAND NEW!!!**,” along with a link to “**Return defective product (Get RMA#).**” **A98 - A100, A168 - A170.**

502. But when they received damaged products and clicked the “Return” link, Consumer Depot displayed a message which said: “**‘SOLD AS IS’ and is NOT eligible for RMA/Return.**” **A99, A169.**

503. Mrs. Wilkes notes in her Affidavit: “I thought it was very misleading for Consumer Depot to place a link for returning defective products by my auction description on the one hand, and then to place separate “As-Is” and “No Returns” messages in separate portions of the auction pages next to unrelated auction items.” **A170.**

504. Consumers who attempt to make returns without RMA numbers have their returns rejected and sent back to them, even when express-mailed within seven days. **A233.**

505. One consumer was refused an RMA because *Consumer Depot* did not ship her defective product until *after* the seven-day return period had expired. **A132.**

506. Some consumers who got RMAs and followed all return steps perfectly still had their returns rejected by Consumer Depot. **A434, A453.**

507. Consumers also report being misled about time periods for returns.

508. Defendants frequently impose seven day return periods, and frequently reject returns on the grounds that the returned item did not physically arrive at Consumer Depot by the seventh day - a limitation not disclosed in the advertising.

509. For example, consumer Marco Muto received the wrong product and contacted Consumer Depot that same day. **A111 - A112.**

510. Mr. Muto was told he would get a refund, but would not get a refund of shipping charges. *Id.*

511. Mr. Muto returned the item, but Consumer Depot rejected his return, claiming that it did not arrive within seven days, even though Mr. Muto had shipped it within seven days and Consumer Depot received on the eighth or ninth day at the latest. **A87.**

512. Consumers also report that repeated attempts at contacting defendants by e-mail, webform or telephone prove futile. **A52 - A53, A60 - A61.**

513. As one consumer reported to the Better Business Bureau:

"They had sent the wrong stuff. They took a very long time in responding to my email. I then tried to call them at the eBay phone number listed only to find they had a voicemail recording that tells you to use email to contact them. Then one day I get an email tell me to use their web site for an RMA because they sent the wrong stuff. The web site gave a error message and I was not able to get an RMA. I sent them an email about this and again they told me to use their web site. A never endless loop.

Mary Jane Belland BBB Complaint, **A228.**

514. Consumer Depot has admitted that it lists no phone number for consumers to contact it before bidding on its eBay auctions, nor concerning their eBay auctions. *See Response to Request for Admissions Nos. 28 and 29, A819.*

515. Consumer who place telephone calls in advance of bidding on an item do not receive return calls from Consumer Depot. *See Carol Fike Dep. at p. 42.*

516. Consumer Depot uses an automated computer system to respond to consumer complaints and does not accept complaints by telephone. *See Response to Request for Admissions Nos. 18, A817.*

517. Defendant Carol Fike has testified that Consumer Depot does not get many telephone complaints. *See Carol Fike Dep. at pp. 41 - 42.*

518. Defendant Carol Fike also testified that Consumer Depot does not receive those types of telephone calls. *Id.*

519. Defendant Carol Fike has testified that if CD had misrepresented a product, "we would probably refund the customer that." *Id.* p. 55.

520. Defendant Carol Fike testified that if a consumer sent an email about a problem, or if there was some communication, "I'm sure there would be some consideration." *Id.* at p. 57.

521. Defendant Carol Fike testified that with a website sale, if a consumer made a return because they didn't want the item, a non-defective return, there would be a restocking fee only for a higher value item such as a \$500, \$600 notebook computer. *Id.* p. 58.

522. Defendant Carol Fike testified that on "any smaller items, [Consumer Depot] just we just refund it without a restock fee because it's going to turn into a credit card hassle." *Id.*

523. Defendant Carol Fike testified she would think that with 99.9 percent of their eBay auctions, consumers get full refunds of their purchase price and shipping. *Id.* at 59.

524. Defendant Carol Fike testified that a "credit card chargeback costs my company \$35 dollars to process from the credit card company, and I want to avoid those." *Id.* at p. 60.

525. Defendant Carol Fike testified that even though Consumer Depot's eBay auctions say there is a seven day return period, consumers have "ten days, two weeks, at least; at least to obtain a number [RMA] to return the product." *Id.*

526. Defendant Carol Fike testified that the two weeks period is just for purposes of getting a return authorization number. *Id.* at 60 - 61.

527. Defendant Carol Fike testified that this two week added time period for getting an RMA has always been the case w/eBay sales. *Id.* at 61.

528. Defendant Carol Fike testified that consumers have up to two weeks to get an RMA number from Consumer Depot for purposes of returning an eBay purchase. *Id.*

529. Defendant Carol Fike testified that after getting an RMA, a consumer has at least another 10 days to send the item back to Consumer Depot. *Id.* at 62.

530. Defendant Carol Fike testified that Consumer Depot pretty much takes everything back unless the consumer is returning something with a six month old RMA on it. *Id.*

531. Defendant Carol Fike testified that Consumer Depot is not strict about the return time at all. *Id.*

532. Defendant Carol Fike testified that if a consumer waits past 14 days to get an RMA, then its too late. *Id.* at 64.

544. Defendant Carol Fike testified that consumers could still email Consumer Depot via its webform or open dispute through eBay and get RMA that way. *Id.* 65.

545. In that case, RMA would have to be issued manually, but that is not explained

anywhere on the auction site. *Id.*

546. Defendant Carol Fike testified that Consumer Depot does not make that many mistakes. *Id.*

547. Defendant Carol Fike testified that if a consumer with its eBay auctions, Consumer Depot refunds shipping costs both ways if it made the mistake. *Id.* at 66.

548. During the course of the Attorney General's investigation, when Consumer Depot was asked about 87 different consumer complaints that had been reported to date, Consumer Depot determined that only 2 of those complaints had any merit. *Id.* at 67 and Exhibit 1 thereto.

549. Defendant Carol Fike testified that "It costs [Consumer Depot] dearly to process a return and give a full refund." *Id.* at 69 - 70 and Exhibit 4 thereto.

550. In a letter written to Joyce Hughey at the Tennessee Division of Consumer Affairs, Consumer Depot represented that a consumer had 14 days to get an RMA from the date the consumer receives the product." *Id.* at 78.

551. Defendant Carol Fike testified that the RMA process is automatic, which means the RMA is issued automatically. *Id.* 79 - 80.

552. The computer does not know exactly when any particular consumer receives a product. *Id.* at 80.

553. Defendant Carol Fike testified that in cases where the time allowed to get an RMA is 14 days from the receipt of the product, it's really more like 21 or more days from the date of shipping. *Id.*

554. Defendant Carol Fike testified that in Consumer Depot's retail store, as-is means as-is, no matter what. *Id.* at 95.

555. In her complaint to the Better Business Bureau, consumer Theresa Allen observed that "They [Consumer Depot] do not answer their phones." **A216.**

556. In her complaint to the Better Business Bureau, consumer Theresa Allen observed that "There is no way to contact the company [Consumer Depot]." **A216.**

557. In his complaint to the Better Business Bureau, consumer Paul Barron reported that the "telephone number Consumer Depot provided Visa with (1-888-751-2125) is not a working phone number." **A225.**

558. After only being offered a store credit by Consumer Depot, consumer Paul

Barron complained to the BBB that "I did not spend \$103.56 at Consumer Depot just to gain a store credit to be spend on items other than the item I requested." **A225.**

559. In her complaint to the Better Business Bureau, consumer Theresa Allen observed that "The 7 day money back refund is a joke because the shipping charges are SO high, I have already lost 18.00 on shipping. If I ship the scanner back to them for a refund, I will have return shipping charges as well. All for a .56 cent refund? This is how they get you! They bank on customers not returning defective merchandise or JUNK merchandise they are selling as NEW." **A216.**

560. In his complaint to the Better Business Bureau, consumer Kevin Allen observed that "Consumer Depot sent me a defective product, charged me to send it back and then would not replace it." **A219.**

561. In his complaint to the Better Business Bureau, consumer Joseph Aloï reported:

[P]urchased 8 items from this company [Consumer Depot] in an online auction, all of which were advertised as "factory new," good condition, etc. . . . not once was it implied that there was anything wrong with this merchandise. I paid a total of \$342.07 to this company for merchandise as follows:

- panasonioc phone/answering machine - won't turn on
- lexmark z-65 color printer - won't turn on
- lexmark z-54 printer - does not work
- sharp microwave oven - does not work
- uniden phone answering machine - no power supply
- samsung dvd player - dented, scraped and broken buttons
- hp print/scan/copy machine - no software or drivers to install

All of these items were a total of \$342.70, of which the item cost was only \$76.07 and the shipping was 266.00. They say that if I pay the shipping cost to return the items (266.00) that they will refund me the 76.07!!!!" **A220.**

562. In his complaint to the Better Business Bureau, consumer Grant Berry observed that "They [Consumer Depot] require that I pay for shipping if I return it and that makes 50% of the cost of the item itself." **A228.**

563. In his complaint to the Better Business Bureau, consumer Thomas Antal observed that Consumer Depot "charges a 20% restocking fee. I don't think I should be charged a fee for an item that was not new and didn't work." **A222.**

564. In his complaint to the Better Business Bureau, consumer Thomas Antal reported that "After numerous tries I was unable to get the return number (site designated that way) to limit returns." **A222.**

565. In his complaint to the Better Business Bureau, consumer Clark Biggers observed that he “had to have “RMA number” with the return. However, seller did not explain what an “RMA number” was or where to obtain such number. Seller further refused to respond to two emails regarding this topic, so I sent it (WITHIN 7 DAYS) by FedEx back to seller. Seller has refused to accept delivery of package stating it has no RMA number. After seller’s direct website was found, contact through that medium was returned with generic reply which was non-responsive to the issues. A second communication through their website was sent, to which they replied it is their policy to not accept returns beyond 7 days or without an RMA number.” **A233.**

566. In his complaint to the Better Business Bureau, consumer John Birkenstamm reported that “All I want is an RMA to return [defective] goods. They will not accommodate me and they say too bad if the website will not allow me to do so.” **A236.**

567. In his complaint to the Better Business Bureau, consumer Kevin Allen reported that “As per [Consumer Depot’s] instructions I got an RMA number and shipped it back to them costing me \$15 to send packed up via UPS. Although they had 34 more identical phones in stock they only offered to refund my \$12.50 and then told me to go to their website to order another phone at the cost of over \$30. They would not honor their original price and I got stung with the shipping costs. In this short transaction, Consumer Depot cost me \$15 and I got nothing, no phone.” **A219.**

568. In her complaint to the Better Business Bureau, consumer Mary Jane Belland reported that Consumer Depot had “sent the wrong stuff. They took a very long time in responding to my email. I then tried to call them at the eBay phone number listed only to find they had a voicemail recording that tells you to use email to contact them. Then one day I get an email tell me to use their web site for an RMA because they sent the wrong stuff. The web site gave a error message and I was not able to get an RMA. I sent them an email about this and again they told me to use their web site. A never endless loop.” **A228.**

569. Many other consumers have complained that Consumer Depot regularly refuses to remedy problems where the fault clearly lies with Consumer Depot. *See, e.g.,* Muto Aff, ¶ 6, **A110 - A117**, Layton Aff, ¶ 6-8, **A59 - A66**, Martin Aff., ¶¶ 4-7, **A85 - A87**, Machata Aff., ¶¶ 2-12, **A77 - A84**, ; Lock Aff., ¶ 6, **A69 - A76**, Schuler Aff., ¶ 7, **A127 - 134**, Bryson Aff., ¶¶ 1-4, **A37 - A39** and Weissman Aff., ¶¶ 1-6, **A161 - A167**.

570. Even in cases of express misrepresentation or false advertising, Consumer Depot routinely disclaims responsibility by relying on “as-is” disclaimers or other pretexts and refuses to respond to e-mails or issue refunds. *See, e.g.,* LaRock Aff., ¶¶ 6-8, **A67 - A68**, Perry Aff., **A432**, Schuler Aff., ¶ 7, **A127 - A134** and Weissman Aff., ¶¶ 1-8, **A161 - A167**.

571. In rare cases where extremely motivated consumers manage to secure refunds, Consumer Depot nevertheless refuses to refund shipping costs. *See, e.g.,* Armes Aff., **A541 - 551** and Citro Aff., **A45 - A50**.

572. Consumer Depot's eBay feedback records show that to date, over 21,000 individual consumers have posted negative or neutral feedback against Consumer Depot as a result of its selling practices.

Q. Retaliating Against Complaining Consumers

573. eBay members who experience bad transactions with other eBay members have the option of posting "feedback" on eBay, so that others can consider this feedback before doing business with a particular eBay member.

574. A number of complaints previously set forth examples of retaliation by Consumer Depot against consumers who encountered a problem through no fault of their own, were not able to get a resolution from Consumer Depot, left negative feedback against Consumer Depot and received unjustified and damaging negative feedback from Consumer Depot in return.

575. Some consumers who felt they had been deceived, misled or defrauded by Consumer depot stated they refrained from leaving negative feedback against Consumer Depot because they were afraid that Consumer Depot would unfairly retaliate against them and leave negative feedback against them.

1. Consumer George Reisdorf

576. On February 23, 2006, consumer George Reisdorf visited eBay's internet auction site and saw that Consumer Depot, through its "**bargaindepot04**" eBay user id was selling **RCA WHP140 900 MHZ Wireless Stereo Headphones** through auction as item number 7592810222. *See* Affidavit of George Reisdorf, ¶ 1 and Exhibit A, thereto. **A606 - A611.**

577. Consumer Depot's eBay auction advertisement for the RCA Wireless Headphones stated "**This item works and looks great!**" *Id.* ¶ 2 and see Exhibit A, p. 2, **A605** and **A609.**

578. Consumer Depot's auction advertising led Mr. Reisdorf to believe that Consumer Depot was offering a fully functional set of **RCA Wireless Headphones** that were in great condition and worked very well. *Id.*

579. Consumer Depot's advertising did not mention or disclose any problems or defects with the RCA Wireless Headphones. *Id.*

580. On February 23, 2006, Mr. Reisdorf submitted the winning bid for the **RCA Wireless Headphones** and paid Consumer Depot a total of \$14.99: \$.99 for the item and

\$14.00 for shipping. *Id.* ¶ 3.

581. When Mr. Reisdorf's **RCA Wireless Headphones** arrived from Consumer Depot, they were not as advertised. *Id.* ¶ 4.

582. The transmitter in the RCA Wireless Headphones kept shorting out, making the headphones useless. *Id.*

583. Mr. Reisdorf sent e-mails to Consumer Depot asking it to replace the headphones, but Consumer Depot sent him an automated message telling him that Consumer Depot did not replace broken items, but would refund the purchase price and shipping if he returned the headphones within seven days with an RMA form. *Id.* ¶ 5.

584. Mr. Reisdorf filled out the RMA form, but when he learned it would cost between \$10.00 to \$15.00 to ship the headphones back to Consumer Depot, he decided it wasn't worth it. *Id.*

585. Mr. Reisdorf later saw that the RMA form Consumer Depot provided to him contradicted the emails Consumer Depot sent him, and did not provide for a refund of shipping costs. *Id.*

586. Mr. Reisdorf also saw that Consumer Depot's RMA form stated that there was a 20% restocking fee, which was another condition Consumer Depot had not previously disclosed. *Id.*

587. Knowing that Consumer Depot issued retaliatory negative feedback against complaining consumers, Mr. Reisdorf left neutral feedback against Consumer Depot on eBay. *Id.* ¶ 6.

588. Consumer Depot responded by leaving neutral feedback on eBay against Mr. Reisdorf, which Mr. Reisdorf felt was retaliatory because he deserved positive feedback. *Id.*

589. Mr. Reisdorf felt he had been defrauded, deceived and misled by Consumer Depot. *Id.* ¶ 7.

2. Consumer Mary Wilkes

590. Consumer Mary Wilkes won defendants' eBay auction for two movie DVDs. Wilkes Aff., ¶¶ 1-4, **A168 - A189**.

591. Consumer Depot's eBay advertisement stated the following:

Auction Details

This [movie/DVD] is brand new; the Paper cover got

wet. -Another unbelievable bargain just for you. This item is BRAND NEW !!! Bid NOW. The photo above is the item you are bidding on.

- [Have questions? Click here!](#)
- [Return defective product \(Get RMA#\)](#)

Id., ¶ 2 and Exhibits A and B thereto.

592. When Ms. Wilkes received her DVDs from Consumer Depot, they were in terrible condition and totally unusable. *Id.*, ¶ 5.

593. There was a strong stench coming from the DVDs before they were even opened. *Id.*

594. Both DVDs were soggy and mildewed, and the cover on one DVD actually had black mold growing on it. *Id.*

595. Ms. Wilkes produced and authenticated the actual DVDs received from Consumer Depot, which still maintain the malodorous stench she describes, along with the visible black mold. Both DVDs have been refrigerated since receipt, and will be available for inspection during the hearing on this matter. *Id.*

596. Ms. Wilkes promptly went to the Consumer Depot auction site to return the DVDs. *Id.* ¶ 6.

597. She clicked the "[Return defective product \(Get RMA#\)](#)" link provided by Consumer Depot at the end of her DVD Auction Details, but upon entering her first item number, Consumer Depot displayed the following message:

AUCTION # 6469815528 was 'SOLD AS IS' and is NOT eligible for RMA/Return.
Please [click here](#) to refer to your AUCTION for more information.

Id., and see Exhibit C thereto.

598. Ms. Wilkes went back to the auction page and saw that Consumer Depot stated in a separate "Returns" section that "All Sales Final - Sold As Is - No Returns." *Id.*, ¶ 6 and see Exhibits A and B thereto.

599. Ms. Wilkes was very upset about Consumer Depot's sales practices and decided to leave negative feedback about Consumer Depot on eBay. *Id.* ¶ 7.

600. As soon as she did, Consumer Depot promptly retaliated and posted negative

feedback about Ms. Wilkes on eBay. *Id.*

601. Up until that point, Ms. Wilkes enjoyed a 100% positive feedback rating on eBay for her 81 transactions, but as a result of Consumer Depot's negative feedback, she lost her 100% positive rating. *Id.* ¶ 7.

602. Mrs. Wilkes also made attempts to communicate with Consumer Depot, but to no avail. *Id.* ¶ 9.

603. As Ms. Wilkes states in her Affidavit: "I thought it was very misleading for Consumer Depot to place a link for returning defective products by my auction description on the one hand, and then to place separate "As-Is" and "No Returns" messages in separate portions of the auction pages next to photographs of unrelated auction items." *Id.*, ¶ 6 and see Exhibits A and B thereto.

604. Numerous other consumers who had bad experiences with Consumer Depot have reported that upon leaving negative feedback on eBay about Consumer Depot, Consumer Depot promptly retaliated and left negative feedback on eBay against them. *See, e.g., A41, A52 - A53, A61, A70, A79, A112, A119, A126, A129 and A170.*

605. In most cases, Consumer Depot left negative feedback which was false or involved situations where Consumer Depot was clearly at fault and had refused to remedy the problem. *See, e.g., A40 - A41, A51 - A53, A59 - A61, A69 - A71, A77 - A79, A110 - A112, A118 - A119, A127 - A129 and A168 - A170.*

604. For example, consumers Marco Muto, Gerald Koehler and Barbara Layton all received the wrong item from Consumer Depot through no fault of their own. **A51 - A53, A59 - A60 and A110 - A112.**

605. After their repeated attempts at return failed, each posted negative feedback about Consumer Depot on eBay, and each immediately received negative feedback from Consumer Depot. **A52 - A53, A61 and A112.**

606. Consumer Depot responds to more than 95% of the negative feedback it receives from consumers on eBay by posting negative feedback against the consumer's eBay user name. *See Response to Request for Admission No. 24, A818.*

607. "This type of behavior by an eBay seller is intimidating and undoubtedly deters consumers from leaving negative feedback against Consumer Depot on eBay." *See Layton Aff. at ¶ 8, A59 - A66.*

608. "The use of autoresponders on eBay seems to be a violation of the spirit of

eBay and defrauds all future shoppers about the seller because defrauded buyers learn they should not leave negative feedback on eBay about a dishonest seller, unless those buyers also want negative feedback left against them. The practice of such retaliatory feedback seems to be extortion and artificially inflates the positive rating of the seller. Customers are being penalized for being defrauded.” Affidavit of William Bartling, ¶ 8, **A552 - 559**.

III. CONSUMER DEPOT’S BUSINESS VOLUME AND SALES

609. To date, Consumer Depot has sold over 600,000 items through eBay auctions. See Responses to Requests for Admissions 6 - 17, **A813 - A817**.

610. From 1999 to 2004, Consumer Depot’s sales totaled over \$36 million. See Carol Fike Dep. at 68, **A881**.

611. In 2004, Consumer Depot shipped almost 60,000 internet and auction orders. *Id.* at 69.

612. In January 2006, Consumer Depot’s **bargaindepot04** eBay user id had sold over 110,000 items on eBay and carried an eBay feedback rating of approximately **92.2 %** positive. **A598**.

613. An eBay feedback rating of **92.2%** positive in January 2006 meant that approximately one in every twelve eBay feedback comments was negative.

614. In March 2004, Consumer Depot’s **surplusdealz** eBay user id had sold over 4,900 items on eBay and carried an eBay feedback rating of approximately **84.7 %** positive. **A564**.

615. An eBay feedback rating of **84.7%** positive in March 2004 meant that approximately one in every seven eBay feedback comments was negative.

616. In June 2006, Consumer Depot’s **auctiondepot-tn01** eBay user id had sold approximately 100 items on eBay and carried an eBay feedback rating of approximately **90.6 %** positive. **A641**.

617. An eBay feedback rating of **90.6%** positive in June 2006 meant that approximately one in every ten eBay feedback comments was negative.

618. In June 2006, Consumer Depot’s **music-n-dvds** eBay user id had sold over 120,000 items on eBay and carried an eBay feedback rating of approximately **91.0 %** positive. **A648**.

619. An eBay feedback rating of **91.0%** positive in June 2006 meant that

approximately one in every eleven eBay feedback comments was negative.

620. In June 2006, Consumer Depot's **surplusdealz** eBay user id had sold over 21,000 items on eBay and carried an eBay feedback rating of approximately **85.9 %** positive. **A652.**

621. An eBay feedback rating of **85.9%** positive in June 2006 meant that approximately one in every eight eBay feedback comments was negative.


622. In June 2006, Consumer Depot's **swdiscounters** eBay user id had sold over 4,900 items on eBay and carried an eBay feedback rating of approximately **93.0 %** positive. **A655.**

623. An eBay feedback rating of **93.7%** positive in June 2006 meant that approximately one in every twelve eBay feedback comments was negative.

625. Consumer Depot eBay feedback rating are some of the lowest large seller ratings on eBay. *See Affidavits Filed Under Seal (of record).*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, OLHA N.M. RYBAKOFF, hereby certify that on Tuesday, February 10, 2009, I caused a true and exact copy of the foregoing MEMORANDUM OF FACTS IN SUPPORT OF STATE OF TENNESSEE'S MOTION FOR SUMMARY JUDGMENT to be served by placing a copy thereof in the United States First Class Mail, postage prepaid, addressed to:

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